

2005

Denis L. Gray, Milda M. Gray Tom Hollander, La
Canada Crest, INC., and Dalton Place Associates v.
Oxford Worldwide Group Inc : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DENIS L. GRAY, MILDA M. GRAY
TOM HOLLANDER, LA CANADA)
CREST, INC., and DALTON PLACE)
ASSOCIATES,

BRIEF OF APPELLEE

Appellants/Plaintiffs,

vs.

Trial Court Case No. 020915159

OXFORD WORLDWIDE GROUP

Appellate Case No. 20050665-CA

Appellee/Defendant.

Appeal From the Third Judicial District Court, Salt Lake County, State of Utah
The Honorable Judge Frank G. Noel

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APPELLEE REQUESTS ORAL ARGUMENT AND A PUBLISHED DECISION

UTAH APPELLATE COURT

NOV 30 2005

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APPELLEE REQUESTS ORAL ARGUMENT AND A PUBLISHED DECISION

LIST OF PARTIES

Appellants/Plaintiffs

Denis L. Gray, Milda M. Gray, Tom Hollander, La Canada Crest, Inc., and Dalton Place Associates

Appellee/Defendant

Oxford Worldwide Group, Inc.

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I. STATEMENT OF JURISDICTION

Pursuant to U.C.A. § 78-2a-3(2)(j), and the Utah Constitution, Art. VIII, § 3, this Court has jurisdiction over the present appeal.

II. STATEMENT OF THE CASE

A. Nature of the Case and Proceedings Below

The case is a landlord/tenant dispute; Appellants are principals of the landlord and the landlord (collectively, “Landlord”) and Appellee is the tenant (“Tenant”). The Landlord brought a breach of lease claim against the Tenant and the Tenant counterclaimed for defamation, breach of the lease, breach of covenant of quiet enjoyment, and false light. The Tenant, however, only tried its breach of lease and breach of covenant of quiet enjoyment claims at trial based on the Landlord’s summary judgment motion and based on partial voluntary dismissal.

This case was tried before Third District Court Judge Frank G. Noel on January 5, 2005. After a one-day bench trial, Judge Noel took the matter under advisement and

subsequently in his *Memorandum Decision* dated January 20, 2005, he denied the Landlord's claims and granted the Tenant's claim for breach of covenant of quiet enjoyment. [R. at 231-239].¹ Judge Deno Himonas (who replaced the retiring Judge Noel), signed and entered *Findings of Fact, Conclusions of Law, and Final Judgment* on July 12, 2005.² The present appeal is taken from said ruling.

B. The Tenant's Response to the Landlord's *Background* Section

The Landlord attempts to set forth background facts in the *Background* section to its appeal brief. However, the Landlord fails to cite to the record (i.e. the trial transcript) in support of its factual asserts.

Additionally, and fatal to the Landlord's appeal, the Landlord's *Background* section completely fails to marshal evidence from the trial transcript in support of the Trial Court's findings of fact and conclusions of law. This failure to marshal is more thoroughly discussed in the *Argument* section below.

C. The Tenant's Statement of Material Facts

1. The Tenant leased the premises in question ("Premises") which was owned by the Landlords. [R. at 264, ¶ 1]

¹ A copy of the Memorandum Decision is attached to the accompanying Appendix as Exhibit A.

² A copy of the Findings of Fact, Conclusions of Law, and Final Judgment is attached to the accompanying Appendix as Exhibit B.

2. From the outset of their tenancy, the Tenant had difficulties with another tenant about parking stalls around the Premises. The Tenant understood that it would have exclusive use of four stalls directly in front of the Premises based on representations by the Landlord's property manager, Brenda Bellamy. However, adjoining tenants constantly used those spaces. Although Ms. Bellamy told the Tenant she would help with the problem, ultimately she did nothing to resolve it. [R. at 233; 277, pg. 130:16-131:2]³ Instead, Ms. Bellamy maintained a sarcastic demeanor to Dr. Madrigal when he contacted her to lodge complaints or concerns about the parking. [R. at 277, pg. 131:21-25] In fact, during one of those conversations Ms. Bellamy hinted at her anti-Hispanic prejudices by rudely telling Dr. Madrigal that "Hispanics were all the same," which deeply upset Dr. Madrigal. Id. at 131:25-132:2.

3. The Tenant is a language training school which primarily caters to Latinos, sponsored a fiesta for its students and the public on Saturday, October 12, 2002 at the Premises. [R. at 264, ¶ 2]

4. The Landlord's property manager, Ms. Bellamy, learned of this fiesta approximately one week before the fiesta. [R. at 264, ¶ 3]

³ Excerpts from the transcript (which is located at R. at 277) are attached to the accompanying appendix as Exhibit C.

5. Ms. Bellamy exchanged emails and phone calls with the principals of the Tenant – Dr. Joseph Madrigal and his wife, Sonia Madrigal – regarding allegations of underage drinking at the upcoming fiesta. [R. at 264, ¶ 4]

6. In the phone call between Ms. Bellamy and Mrs. Madrigal (also a principal of the Tenant) on October 8th, Ms. Bellamy derogatorily told Mrs. Madrigal, “[y]ou are [] Mexicans. You are all [] the same. You are wetbacks.” [R. at 277, pg. 176:9-10] Ms. Bellamy also told Mrs. Madrigal that she was a “greasy” Mexican and that the Madrigals will never “be more up than us . . . You think you are the best but you aren’t.” Id. at 176:24-177:5. Ms. Bellamy also yelled and swore at Mrs. Madrigal in the same conversation, causing Mrs. Madrigal to end the verbal abuse by hanging up the phone. Id. at 176:15-21; 11-17.

7. Dr. Madrigal had strict prohibitions in the Tenant’s business and in his personal life against the use of alcohol. [R. at 264, ¶ 5]

8. In fact, Dr. Madrigal informed Ms. Bellamy prior to her call to the police to investigate for underage drinking, that there would be no alcohol served at the fiesta. Dr. Madrigal also informed Ms. Bellamy his own personal standards regarding the consumption of alcohol and informed her that he had invited many dignitaries to the fiesta, including Governor Leavitt, the Mexican Consulate, and other important individuals. [R. at 264, ¶ 6]

9. Dr. Madrigal made it very clear to Ms. Bellamy that there would be no drinking at all, including underage drinking. [R. at 265, ¶ 7]

10. Dr. Madrigal had also contacted Appellant Tom Hollander, an owner of the Premises, prior to the fiesta, and had spent an hour and a half on the phone with Mr. Hollander explaining the nature of the fiesta. Mr. Hollander gave Dr. Madrigal permission to conduct the fiesta. [R. at 265, ¶ 8]

11. In spite of this permission, Ms. Bellamy nonetheless called the police at the beginning of the fiesta on October 12th, complaining of underage drinking at the fiesta. [R. at 265, ¶ 9]

12. The police investigated Ms. Bellamy's complaint by appearing at the fiesta and inspecting the fiesta for such underage drinking. [R. at 265, ¶ 10]

13. The attendance of the police created quite a stir at the fiesta. [R. at 265, ¶ 11]

14. No phone calls were made during the fiesta itself. [R. at 265, ¶ 12]

15. Ms. Bellamy received from Dr. Madrigal a detailed and passionate letter explaining the nature of the fiesta, the Tenant's views regarding alcohol, and which indicated that various dignitaries had been invited and were going to participate in the fiesta, such as Governor Leavitt, the Mexican Consulate, the Peruvian Honorary Consul, the Chilean representative in Utah, the American Red Cross, and others. [R. at 265, ¶ 13]

16. Indeed, Dr. Madrigal also testified to an earlier incident where Ms. Bellamy made a comment to him that could be interpreted as racial. [R. at 266, ¶ 17]

17. The Appellants did not attend this trial to testify on their own behalf, and thus provided no explanation why they would give permission to Dr. Madrigal on the one hand, and then on the other hand order the police investigation. [R. at 266, ¶ 18]

18. Because of Dr. Madrigal's reputation in the community and because 90% of the Tenant's customers are LDS, to have a police officer investigate the fiesta based on an allegation of underage drinking was a serious blow to him personally and to the Tenant. [R. at 266, ¶ 19]

19. Some of the students who left the school after the October 12th fiesta were "hysterical" about leaving. [R. at 277, pg. 182:22-25] They were worried because the school had never had police show up before, and because Hispanics think that police showing up is a "big deal," especially when they have done nothing wrong. Id. at 184:4-10. The Madrigals had to settle their students down. Id. at 184:11-12. The students were concerned with the situation at the school and "whether they can be in there or what they will do in the future." Id. at 184:17-20. Dr. Madrigal testified that the experience with Ms. Bellamy was so personally upsetting to him that he could not "handle it anymore." Id. at 139:23-25.

20. The principals of the Tenant met the week following the fiesta and decided to vacate the Premises at the end of that month because they felt they could no longer remain based on the feelings that had developed, as well as the attitude of the Ms. Bellamy and the owners of the Premises toward them. [R. at 266, ¶ 20]

21. As a result of moving from the Premises, the Tenant lost 14-15 students, which at \$2,700 per semester per student equaled approximately \$40,000 in lost revenues for the semester. [R. at 277, 139:10-25]

22. The Tenant had had very little contact with the Landlord's property manager and, in fact, had not seen the property manager on the Premises in the years that the Tenant had been a tenant. The Tenant's principals felt that their expressed needs and concerns were not addressed by the Landlord's property manager. [R. at 267, ¶ 22] The Landlord's property manager resided in Park City during the time in question, whereas the Premises is located in Salt Lake County. [R. at 267, ¶ 23]

IV. SUMMARY OF ARGUMENT

The initial hurdle which the Landlord cannot, as a matter of law, overcome – and thus its appeal is fatally defective – is its failure to marshal any facts in support of the Trial Court's decision.

Substantively, the Landlord's appeal is without merit because the facts underlying this dispute are adequate to establish a breach by the Landlord of the covenant of quiet

enjoyment, and thus support the Trial Court's judgment that the Landlord constructively evicted the Tenant.

V. ARGUMENT

A. **THE LANDLORD HAS FAILED TO MARSHAL FACTS AND EVIDENCE IN SUPPORT OF THE TRIAL COURT'S DECISION**

The Landlord has failed to inform this Court of significant portions of the evidence supporting the Trial Court's decision as required by the appellate procedural caselaw.

When challenging a finding of fact, appellate courts refuse to address the challenge unless the appellant has properly marshaled the evidence. See, Child v. Gonda, 972 P.2d 425, 433-34 (Utah 1998); Witear v. Labor Comm'n, 973 P.2d 982, 985 (Utah App. 1998). "To successfully attack the verdict, *an appellant must marshal all the evidence supporting the verdict* and then demonstrate that, even viewing the evidence in the light most favorable to that verdict, the evidence is insufficient to support it." Martinez v. Wells, 88 P.3d 343, 349 (Utah App. 2004) (citations omitted; emphasis added).

When the appellant fails to properly marshal facts, "the court of appeals must assume that the record supports the findings of the trial court." Eggett v. Wasatch Energy Corp., 2004 UT 28, ¶ 10 (citation omitted); Valcarce v. Fitzgerald, 961 P.2d 305, 312 (Utah 1998); Johnson v. Higley, 977 P.2d 1209, 1218 (Utah App. 1999). If the evidence is properly marshaled, appellant then must show that the marshaled evidence is legally insufficient to support the challenged findings when viewing the evidence and inferences

in a light most favorable to the decision. Child, 972 P.2d at 433; Johnson, 977 P.2d at 1217.

The Utah Supreme Court has even reiterated this marshaling rule in the context of an appeal of a constructive eviction ruling:

We next address Mutual's claim that the findings and the resulting conclusion that there was no constructive eviction are not adequately supported by the evidence. To mount a successful challenge to the correctness of a trial court's findings of fact, an appellant must first marshal all the evidence supporting the finding and then demonstrate the evidence is legally insufficient to support the findings even in viewing it in the light most favorable to the court below.

Reid v. Mutual of Omaha Insurance Co., 776 P.2d 896, 899 (Utah 1989) (citations omitted); see also, Thirteenth & Washington Sts. Corp. v. Neslen, 254 P.2d 847, 849 (Utah 1953) (stating, "In surveying the evidence to see whether the trial court was justified in holding that there was a constructive eviction, we review it, and every inference fairly arising therefrom in the light most favorable to the defendants, they having prevailed below.")

Finally, not only must the appellate court conclude that a finding is against the clear weight of the evidence for it to be clearly erroneous, but the appellate court must also "give 'due regard' to the trial court's opportunity to assess the credibility of the numerous witnesses called by each party." Reid at 900.

In the present case, the Trial Court issued 24 detailed findings, covering a full day of trial testimony and approximately one dozen pieces of evidence. Despite this, the

Landlord has failed to marshal *any* evidence in support of the Trial Court's findings and conclusions. The Landlord has also failed to acknowledge that the trial evidence must be viewed in the light most favorable to the Tenant, and also ignored the "due regard" appellate courts must give to trial courts regarding the credibility of trial witnesses.

Because the Landlord has failed to marshal evidence in support of the Trial Court's ruling, but instead has placed that burden on the Tenant to show this Court that evidence exists that supports the Trial Court's ruling (evidence which the Landlord should have marshaled), the following is a list of trial testimony and documentary exhibits that support the Trial Court's ruling (and the Tenant's defense) that the Landlord breached the covenant of quiet enjoyment it owed to the Tenant:

1. The Tenant and Landlord entered into a lease of the Premises. [R. at Exhibit 1]

The lease contained a "quiet possession" provision:

If upon tenant paying the rent reserved hereunder and observing and performing all of the covenants, conditions, and provisions on tenant's part to be observed and performed hereunder, tenant shall have quiet possession of the premises for the entire term hereof subject to all the provisions of this lease. [Exhibit 1, pg. 11, ¶ VIII]

2. The Tenant is a school primarily teaching English to Hispanic students. [R. at 277, 115:25-116;1, 19-20]. The Tenant also provides free community services to the Hispanic community such as help with filling out and filing taxes and help to various police departments. Id. at 116:1-4. Ninety-five percent of the Tenant's students are

Hispanic. Id. at 116:21-23. Also, 90% of the Tenant's students are LDS and the Tenant requires its students to sign a contract whereby the student agrees to abstain from alcohol consumption, among other things. Id. at 117:9-13; 119:16-20.

3. Dr. Joseph Madrigal, principal of the Tenant, was originally from Mexico but is now a U.S. citizen. [R. at 277, pg. 114:18-19] He has a PhD in statistics from the University of Oxford in England, was (and still is) a BYU statistics professor, president of the South Central Utah Hispanic General Commerce, on the Board of the Provo General Commerce, on the Board of the Provo City Library, and the vice-president of the American Society for Equality (all during the relevant time in question). Id. at 80:4-8; 114:11-14; 115:2-16.

4. Just after moving into the Premises, the Tenant began having problems with parking which Ms. Bellamy promised to help fix. Ms. Bellamy never ended up doing anything about this problem. [R. at 130:16-131:2] Instead, Ms. Bellamy maintained a sarcastic demeanor to Dr. Madrigal when he contacted her to lodge complaints or concerns about the parking. Id. at 131:21-25. In fact, during one of those conversations Ms. Bellamy hinted at her anti-Hispanic prejudices by rudely telling Dr. Madrigal that "Hispanics were all the same," which deeply upset Dr. Madrigal. Id. at 131:25-132:2.

5. On October 8th, Ms. Bellamy heard rumors from other tenants at their property who were told by "someone else" about underage drinking that was supposed to take

place at a Columbus Day fiesta planned by the Tenant on October 12th. [R. at 277, pg. 16:5-17:4; 55:20-25; 58:24-59:11; 60:21-61:2.] Ms. Bellamy, however, had no firsthand knowledge of any alleged drinking by the Tenant or its students at the Premises. Id. at 52:19-21.

6. Ms. Bellamy called Mrs. Madrigal (also a principal of the Tenant) on October 8th when Ms. Bellamy first heard the rumors that there would be underage drinking at the October 12th fiesta. [R. at 277, pg. 57:20-24; 175:13-17] During that October 8th conversation, Ms. Bellamy derogatorily told Mrs. Madrigal, “[y]ou are [] Mexicans. You are all [] the same. You are wetbacks.” Id. at 176:9-10. Ms. Bellamy also told Mrs. Madrigal that she was a “greasy” Mexican and that the Madrigals will never “be more up than us . . . You think you are the best but you aren’t.” Id. at 176:24-177:5. That was the first time anyone had ever used such racial slurs and epithets in front of Mrs. Madrigal. Id. at 176:11-12. Ms. Bellamy also yelled and swore at Mrs. Madrigal in the same conversation, causing Mrs. Madrigal to end the verbal abuse by hanging up the phone. Id. at 176:15-21; 11-17.

7. Not finished with the Madrigals, Ms. Bellamy also sent Dr. Madrigal an email that day referring to the alleged drinking that would occur at the October 12th fiesta. [R. at

Exhibit 9; 277, pg. 54:6-16].⁴ Among other things, Ms. Bellamy's October 8th accuses Dr. Madrigal of turning the Premises "into a bar serving alcohol and charging a cover charge." [R. at Exhibit 9]

8. Ms. Bellamy's October 8th email caused Dr. Madrigal to be "very upset, extremely upset." [R. at 277, pg. 126:10-1] That same day Dr. Madrigal replied to Ms. Bellamy's October 8th email, in which Dr. Madrigal passionately informed Ms. Bellamy that the Tenant's students were LDS and thus did not drink alcohol, that Dr. Madrigal is a prominent figure in the Hispanic community due to his various leadership positions in community organizations such as president of the South Central Youth and Hispanic General Commerce, and that he was a BYU professor. [R. at Exhibit 13; 277, pg. 128:11-129:12]⁵ He also informed Ms. Bellamy of the various dignitaries that had been invited to the October 12th fiesta, including Governor Leavitt, the American Red Cross, the Mexican Consulate, the Peruvian Honorary Consul, the Chilean representative in Utah, various firefighters, the United Way, and the International David Kennedy Center Id. at 129:13-19.

⁴ A copy of this email (trial exhibit 9) is attached to the accompanying appendix as Exhibit D.

⁵ A copy of this email (trial exhibit 13) is attached to the accompanying appendix as Exhibit E.

9. Ms. Bellamy never bothered to reply to Dr. Madrigal's email. Id. at 60:14-19; 129:20-22.

10. In addition to responding to Ms. Bellamy's email, Dr. Madrigal called one of the owners of the Premises, Tom Hollander, on October 9th to obtain his permission to have the October 12th fiesta. After an hour and a half phone conversation, Mr. Hollander gave his permission to Dr. Madrigal to allow the Tenant to have the October 12th fiesta. [R. at 277, pg. 123:11-13; 124:3-4, 13-18; 127:8-18].

11. The evening of October 12th, the Tenant held a fiesta to celebrate Columbus Day at the Premises. [R. at 277, pg. 49:7-9; 123:5-9]

12. As a school, the Tenant occasionally had activities for the students such as the October 12th fiesta. [R. at 277, pg. 129:4-6]

13. A number of the dignitaries who were invited to the October 12th fiesta attended. These included the Director of Hispanic Affairs (who represented Governor Leavitt), a representative of the Red Cross, the Mexican consulate, and representatives from Peru and Chile. [R. at 277, pg. 130:1-8]

14. The Landlord's property manager made no effort to call Dr. Madrigal or the Tenant the day of the fiesta to inquire about the underage drinking allegations, or to attend the fiesta to personally investigate themselves. In fact, after Ms. Bellamy's verbally abusive phone call to Mrs. Madrigal on October 8th and her accusatory and condescending

email to Dr. Madrigal that same day, she did nothing to further clarify the underage drinking allegations by the Tenant or its students at the Premises. [R. at 53:2-4; 60:6-11]. Instead, based on the double hearsay set forth in ¶ 5 above, Ms. Bellamy waited four days until October 12th, at which time she called the police to report underage drinking of which she had no personal knowledge. Id. at pg. 104:21-105:3; 12-13; 17-20; 107:1-3.

15. It is undisputed that Ms. Bellamy and/or the Landlord received no complaints from any tenant about alcohol consumption the day of the October 12th fiesta. Id. at 59:14-17; 59:25-5.

16. The two dispatchers that took Ms. Bellamy's call and the investigating police officer testified that they had received a report of *underage* drinking by the Tenant or its students at the Premises. [R. at pg. 104:21-105:3; 12-13; 17-20; 107:1-3; 136:5-7; 166:12-15]

17. A police officer showed up shortly thereafter and investigated the Tenant's fiesta. [R. at 277, pg. 135:1-24]

18. Upon seeing the police at the October 12th fiesta, Dr. Madrigal became very upset and embarrassed. [R. at 277, pg. 135:18-24; 136:12-19]. The students and attendees surrounded the police officer and Dr. Madrigal to listen to why the policeman was there. Id. at 136:20-24. These people surrounding the officer were nervous to see the police at their fiesta, which further embarrassed Dr. Madrigal. Id. at 136:17-19. Upon seeing the

police at the October 12th fiesta, some of the students left because they were scared because of the way Hispanics are about the police. Id. at 148:12-19.

19. The policeman found no evidence of any kind of alcohol consumption at the October 12th fiesta. [R. at 277, pg. 63:16-18; 166:22; 167:5-7]

20. Some of the students who left the school were “hysterical” about leaving. [R. at 277, pg. 182:22-25] They were worried because the school had never had police show up before, and because Hispanics think that police showing up is a “big deal,” especially when they have done nothing wrong. Id. at 184:4-10. The Madrigals had to settle their students down. Id. at 184:11-12. The students were concerned with the situation at the school and “whether they can be in there or what they will do in the future.” Id. at 184:17-20. Dr. Madrigal testified that the experience with Ms. Bellamy was so personally upsetting to him that he could not “handle it anymore.” Id. at 139:23-25.

21. As a result of moving from the Premises, the Tenant lost 14-15 students, which at \$2,700 per semester per student equaled approximately \$40,000 in lost revenues for the semester. [R. at 277, 139:10-25]

22. At the conclusion of taking evidence at the trial below, Judge Noel even expressed concern about the fact that the Landlord gave the Tenant permission to have the October 12th fiesta and understood from Dr. Madrigal’s representations and assurances that it was in no way to be an alcohol problem, but then the Landlord’s property manager

called in the police on the basis of underage drinking even though the Landlord had given permission for the fiesta. [R. at 277, pg. 211:20-212:1]

23. During her testimony at the trial below, Ms. Bellamy could not keep her version of the events straight. After the Landlord commenced this action, Ms. Bellamy submitted an affidavit in this case on August 1, 2003. [Exhibit 10] In said affidavit, Ms. Bellamy testified that, “It was represented to plaintiffs by other tenants of the premises that alcohol *was served* at the party which was illegal and the police were called as a result of nuisance created by the noise level.” [R. at 277, pg. 65:22-25; emphasis added] At trial, however, Ms. Bellamy back-pedaled from her affidavit by testifying that she was in fact told that “alcohol *would be served*” at the October 12th fiesta. Id. at 66:19-20 (emphasis added).

Based on the foregoing number paragraphs of testimony and exhibits which the Landlord failed to marshal in its appeal brief, the Trial Court’s findings and conclusion that the Landlord breached the Tenant’s covenant of quiet enjoyment is well supported in the record. Specifically, the Trial Court found that Ms. Bellamy’s reliance on the tenant’s speculation of underage drinking of alcohol over the detailed letter of explanation from Dr. Madrigal suggests that there may have been some malice on the part of Ms. Bellamy. [R. at 266, ¶ 15] This suggestion of malice supports the Tenant’s claims that Ms. Bellamy made some hurtful comments to Mrs. Madrigal during their telephone

conversation prior to the fiesta. [R. at 266, ¶ 16] The Trial Court thus found that it would have been extremely difficult for the Madrigals to continue to conduct the Tenant's business at the Premises [R. at 267, ¶ 21], and that the Tenant was justified in vacating the Premises as its relationship with the Landlord and the Landlord's property managers had completely broken down, the Tenant's business had been impacted, and the reputation of the Tenant and its principals had been tarnished. [R. at 267, ¶ 24]

The foregoing recitation of facts from the record also demonstrates the Landlord's complete failure of its duty on appeal to marshal facts in support of the Trial Court's findings and conclusions. Consequently, based on the caselaw cited above, this Court should dismiss the Landlord's appeal for failure to marshal evidence.

B. SUBSTANTIVELY, THE LANDLORD'S APPEAL FAILS BECAUSE SUFFICIENT EVIDENCE SUPPORTS THE TRIAL COURT'S RULING THAT THE LANDLORD CONSTRUCTIVELY EVICTED THE TENANT

The Landlord's sole argument on appeal is that the facts and evidence presented at trial, and which support the Trial Court's findings, are insufficient to support the Trial Court's legal conclusion that the Landlord constructively evicted the Tenant.⁶

Utah caselaw contains a number of legal principles that help define a constructive eviction, but which do not provide adequate context to compare said cases to the present

⁶ The Landlord has failed to identify specific findings of fact that supposedly inadequately support the Trial Court's decision.

case. One such Utah case is Brugger v. Fonoti, 645 P.2d 647, 648 (Utah 1982), which held that constructive eviction occurs “where a tenant’s right of possession and enjoyment of the leased premises is interfered with by the landlord, or persons under his control, as to render the premises, or a part thereof, unsuitable for the purposes intended.”⁷ In Neslen, *supra*, the Utah Supreme Court provided the following legal principles regarding constructive eviction:

‘ . . . any disturbance of the tenant’s possession by the landlord, or someone acting under his authority, which renders the premises unfit for occupancy for the purposes for which they were demised . . . amounts to a constructive eviction . . . ’

Neslen, 254 P.2d at 850 (citation omitted). Another consideration in determining constructive eviction is the landlord’s intent to evict the tenant. The Neslen court stated:

‘ . . . there is a ‘constructive eviction when the [landlord], without intent to oust the latter, does some act which deprives the tenant of the beneficial enjoyment of the demised premises or materially impairs such enjoyment.’

Id. at 851 (citation omitted). Intent to evict “may be implied whenever [the landlord’s] conduct is such that it substantially deprives the tenant of the use of the premises for the purpose for which they were demised.” Id. (citation omitted). “[I]t is enough that his acts or omissions make reasonably necessary the tenant’s leaving.” Deseret Federal

⁷ In the Brief of Appellants, the Landlord cites Brugger for four supposed prerequisites for establishing constructive eviction. Not only does the Landlord fail to pinpoint its citation to the prerequisites, but Brugger fails to list the supposed prerequisites in question.

Savings and Loan Assoc. v. United States Fidelity & Guaranty, 714 P.2d 1143, 1146 (Utah 1986) (citations omitted). Finally, “it is the cumulative effect of [the conditions complained of] which must be considered in determining the soundness of the judgment.” Neslen, 254 P.2d at 852.

Based on this caselaw, as well as illustrative constructive eviction caselaw from other jurisdictions, the facts underlying the Tenant’s departure from the Landlord’s property as established at trial support the Trial Court’s findings and conclusion that the Landlord constructively evicted the Tenant.

1. The Landlord’s Constructive Eviction Caselaw is Inapplicable to This Case

Although the Landlord’s appeal brief contains some applicable constructive eviction principles, the cases relied on by the Landlord are factually dissimilar to this case, and thus fail to provide applicable examples of constructive evictions. For example, the Landlord cites Neslen, *supra*, wherein the landlord locked the outer doors to the tenant’s leased space at 8 pm even though the tenant worked until 12 pm, no elevator service was provided after 8 pm, the stairway in the building in question was occasionally blocked by supplies from another tenant, and the property in question had inadequate heating, and unsanitary and improperly ventilated bathrooms. *Id.* at 849-850. These facts are obviously not present in the instant case. Further, Neslen does not deal with malice toward the tenant, racial slurs and epithets, and improperly calling the police on the

tenant.

Similarly, the landlord relies on Deseret Federal Savings and Loan Assoc. v. United States Fidelity & Guaranty, 714 P.2d 1143, 1144 (Utah 1986) which dealt with interruptions of heat, electricity and water, not malicious calls to the police and racial denigration.

Finally, the Landlord cites Reid v. Mutual of Omaha Ins. Co., 776 P.2d 896 (Utah 1989) as an example of loud music, motivational sessions with loud cheering, and overuse of bathroom and parking facilities by a neighboring tenant as being insufficient bases upon which to find constructive eviction. Again, Reid does not contain facts similar to the malice and slurs at issue in the present case.

Accordingly, the caselaw relied upon by the Landlord is unavailing in guiding this Court's application of constructive eviction law to the facts of the present case.

2. Constructive Eviction Caselaw From Other Jurisdictions Is More on Point with the Facts of This Case

Because Utah's law on the covenant of quiet enjoyment/constructive eviction is less than extensive and unrelated to the facts of the present case, caselaw from other jurisdictions must be considered in determining whether the Landlord's malicious conduct supports the Trial Court's determination that the Tenant breached the covenant of quiet enjoyment and thus constructively evicted the Tenant. Consider the following cases:

Mauro v. Division of Housing and Community Renewal, 309 A.D.2d 678, 678 (N.Y.S. 2003):

Verbal abuse and intimidation can constitute harassment [citations omitted] and

petitioner John Mauro had no constitutional right to abuse his tenants verbally. [Citation omitted].

Contrary to petitioners' contention, the harassment finding relating to apartment

4R was not based solely on verbal abuse of Richard Ramos. Calli Lerner, the tenant of record, testified *that Mr. Mauro 'would . . . call us [i.e. both Lerner and Ramos] liars and con artists.'* Moreover, since Ramos was Lerner's boyfriend and roommate, it was reasonable to conclude that *Mr. Mauro's attacks on Ramos would disturb the peace and repose of the tenant of record.* [Citation omitted] [Emphasis added].

Johnson v. Northpointe Apartments, 744 So.2d 899, 902 (Ala. 1999):

Thus, *the covenant is breached . . . if, during his term, the tenant is disturbed by a third person or by the landlord.*" . . . 'Even if not substantial enough to rise to the level of a constructive eviction . . . such interference may constitute a breach of the covenant of quiet enjoyment entitling the tenant to damages.' [Citation omitted]

* * *

In other words, Northpointe had no right to threaten Keith with arrest if he attempted to return to the Johnsons' apartment. *To interfere with Keith's access to his apartment by threats or other forms of intimidation before the expiration of the tenancy subjected Northpointe to liability for breach of the lease contract and for breach of the implied covenant of quiet enjoyment in particular.* [Emphasis added]

Gillingham v. Goldstone, 197 N.Y.S.2d 237, 238 (1959):

'The tenants should be protected from insult.' [Citation omitted]. *Where the landlord's conduct is 'so grossly insulting and threatening in character* as to seriously and substantially deprive the defendant of the beneficial enjoyment of the premises demised,' and as a result, the tenant is forced to vacate the premises, there may be a constructive eviction and a

breach of the covenant of quiet enjoyment.’ [Citation omitted; emphasis added].

Chapman v. Brokaw, 588 N.E.2d 462, 467 (Ill. App. 1992):

Brokaws allege that Chapmans breached the covenant of quiet enjoyment when Chapmans *pounded on their door, harassed them by phone, circled the property in their car, and wrongfully served them with a notice to quit the premises*. . . . the jury found that Brokaw was entitled to \$1,000 for breach of the covenant of quiet enjoyment. [Emphasis added]

Nikzad v. P&H Investments, Inc., 36 Va Cir. 132, 132 (1995):

Certainly [the covenant of quiet enjoyment] includes protection of the tenant against the landlord itself. The Plaintiff alleges that the Defendant and its agents *have intimidated him and has employees by yelling and screaming at them in an effort to provoke a physical confrontation* and to induce the Plaintiff to vacate. He asserts that Defendant’s employees have threatened to throw his merchandise into the street. Plaintiff alleges that as a result, he has lost sales and his business has been threatened. Taking these facts as true, the Court cannot find that, as a matter of law, the Defendant’s alleged harassment may not constitute a breach of the warranty of quiet enjoyment. [Emphasis added]

Manzaro v. McCann, 519 N.E.2d 1337, 1341 (Mass. 1988)

We cannot say the judge’s conclusion to award damages under [the quiet enjoyment statute] was wrong. . . . the only question before us on this issue is whether, as a matter of law, the noise of an alarm ringing for more than one day could not support a finding of a breach of the tenant’s right to quiet enjoyment. *The ringing for a day of an alarm which, we infer, was adequate to alert a sleeping tenant in the event of fire cannot be said as a matter of law to never be sufficient interference to justify relief under* [the statute]. [Emphasis added]

Tenn-Tex Properties v. Brownell-Electro, Inc., 778 S.W.2d 423, 428 (Tenn. 1989):

In summary the evidence is clear that for a number of months prior to 1 October 1982 the parties had negotiated unsuccessfully for renewal of the lease agreement for another term. On that date defendants notified Mr. Atkinson that Brownell would not be renewing its lease, that it had leased other space and would be moving in the near future. He was advised that Brownell intended to abide by the terms of the lease and there is no evidence in this record that they ever did otherwise. *Upon receiving this information Mr. Atkinson [the landlord] began making demands which became more and more strident and assertive, culminating in the declaration of 29 November 1982, through counsel, that defendants were in default under the terms of the lease.* Demand was made for all unpaid rent in the amount of \$30,210 as well as acceleration of other payments which were not due under the lease terms. *This leads to the ineluctable conclusion that there was a constructive eviction of the tenants by the landlord by virtue of Atkinson's conduct, which amounted to a breach of the covenant for quiet enjoyment.* [Emphasis added]

In Lanin v. Thurcon Properties, LTD., 197 A.D.2d 423, 424 (NY App. 1993), an action for water damages to plaintiff's luncheonette, the court held:

we conclude that there was a breach of the covenant of quiet enjoyment as to the second flooding on June 13, 1982, but not as to the first incident of June 6, 1982. With regard to the first flooding, there is insufficient evidence to support plaintiff's claim that this alleged breach was caused by defendants . . .

However, with regard to the second flooding, one week after the first, we find the evidence to be sufficient *since defendants were aware of the first flooding, and the causes thereof, prior to the second flooding.*

* * *

Therefore, there was sufficient evidence to support a finding that the second flooding, one week after the first, from the same source and location on the second floor, directly above plaintiff's premises, *resulted from defendants' action or inaction*, thereby constituting a breach of the covenant in the lease regarding quiet enjoyment. [Emphasis added]

- In Al-Ziab v. Mourgis, 679 N.E.2d 528, 530 (Mass. 1997), the court interpreted Massachusetts' quiet enjoyment statute:

[the quiet enjoyment statute] *imposes liability whenever the 'natural and probable consequence' of a landlord's action was interruption of the tenant's rights.* . . . Indeed, in each case since the 1973 statutory revision in which we have recognized a breach of the covenant of quiet enjoyment, there was evidence that *the landlord failed to act reasonably in the circumstances concerning a problem known to the landlord*, and the natural and probable consequences of such failure caused the interference with the tenant's quiet enjoyment of the premises. [Citations omitted] [Emphasis added].

- Glyco v. Schultz, 29 N.E.2d 919, 925 (Ohio 1972):

Where the landlord causes or permits another to enter onto the land leased to the original tenant, he breaches the covenant of quiet enjoyment. [Citation omitted]. Here, the lessor caused a farmer to enter upon the leasehold and till the soil. Nothing could be a more obvious breach of the covenant of quiet enjoyment. [Emphasis added]

- In Branish v. NHP Property Management, Inc., 694 A.2d 1106, 1107-08 (Penn. 1997), the court held that "[b]y preventing Appellee from inviting social guests to her apartment, Appellant has wrongfully interfered with Appellee's possession. As a result, Appellant has breached Appellee's covenant of quiet enjoyment."
- In Bowers v. Sells, 123 N.E.2d 194, 198 (Ind. App. 1955), the court held that, "the acts of a third person may constitute an eviction if the landlord authorizes them or consents thereto, or fails in a duty incumbent upon him to protect a tenant from them or from their consequences." (Citations omitted).

Thus, according to the above caselaw from other jurisdictions, "[v]erbal abuse and intimidation," harassment, interference by a third-person, "threats or other forms of intimidation," "grossly insulting and threatening" conduct, intimidation by yelling, screaming and threats, threatening the tenant's business interests, "strident and assertive"

demands, wrongful demands, knowledge of the potential cause of a breach of quiet enjoyment, and causing a third-party to enter onto the leased premises are all bases upon which constructive eviction may be found.

Based on the above illustrative constructive eviction caselaw, the Landlord's malicious reporting to the police unsubstantiated hearsay rumors of underage drinking at the October 12th fiesta while at the same time giving the Tenant permission to have the October 12th fiesta; the Landlord's causing the police to intrude upon the Tenant's October 12th fiesta and thereby scaring and intimidating the Tenant's students; the Landlord's reporting said rumors to the police with the understanding that the Tenant predominately catered to the LDS Hispanic community and was run by an LDS BYU professor; the Landlord's understanding that certain community leaders and dignitaries would be in attendance at the fiesta to which the Landlord sent the police; the Landlord having slurred the Hispanic principals of Tenant by calling them "greasy Mexicans," "wetbacks," and denigrating their Mexican nationality; and the Landlord having been otherwise uncooperative in helping the Tenant with previous parking problems – these acts by the Landlord (through its property manager) adequately support the Trial Court's findings and conclusions that the Landlord breached the covenant of quiet enjoyment and thus constructively evicted the Tenant.

Furthermore, the Landlord overlooks the fact that the various less-confrontational options its property manager had in dealing with the unsubstantiated juvenile alcohol consumption rumor, but chose to ignore, further indicate the Landlord's malicious intent in its conduct relating to the Tenant and its October 12th fiesta. Rather than castigate the principals of the Tenant and report underage drinking to the police based on a four-day old double-hearsay rumor from another tenant, the property manager could have (and should have) called the Tenant the day of the fiesta, or personally attended the fiesta to check for alcohol consumption, or further communicated in a reasonable and less strident manner with the Tenant's principals regarding the fiesta, etc. These options were imminently reasonable and available to the Landlord's property manager. Instead, the property manager chose none of this, but decided to act on their own cultural ignorance, bias and prejudices, and believe a four-day old double hearsay rumor over an Hispanic LDS BYU professor's passionate email protests.

The property manager's use of racial slurs such as "greasy Mexicans" and "wetbacks" and other culturally-derogatory words to the Tenant's Hispanic principals is further indicative of the malice of the Landlord's property manager. Calling a Mexican or Hispanic "greasy" and a "wetback" is no less insulting, offensive and appalling than calling an African-American the N-word. Clearly, such conduct by those running the property rented by the Tenant was intimidating and unsettling to the Tenant's principals,

cause for the Tenant to lose trust in the Landlord, cause for the Tenant to believe that the Landlord's property manager would not look out for their interests and concerns, and cause for the Tenant to lose students, and cause for the Tenant and its principals' reputation to be tarnished. One would think that because the Premises had so many vacancies that the Landlord and its property manager would do everything in their power to accommodate the tenants, make them happy, and do whatever was necessary to keep the tenants from leaving.

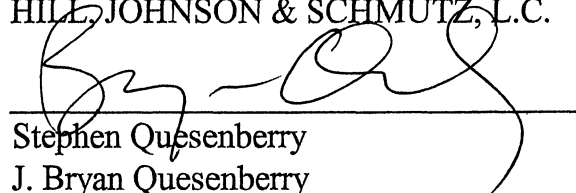
Instead, the Landlord is in effect holding the five-year lease over the Tenant, saying 'you are bound by this and we can treat you however we want. We can talk to you however we want. We can neglect the Premises, your students, your guests and your tenancy, and you can't do anything because you're bound by the five-year lease.' The Landlord's attitude is not right. That is not how you treat your tenants, clients or customers, let alone anyone.

VI. CONCLUSION

Based on the foregoing, the Tenant requests that this Court affirm the Trial Court's judgment, and deny the Landlord's appeal in its entirety.

RESPECTFULLY SUBMITTED this 30 day of November, 2005.

HILL, JOHNSON & SCHMUTZ, L.C.



Stephen Quesenberry
J. Bryan Quesenberry
Attorneys for Appellee

VII. APPENDIX

- Exhibit A** – Memorandum Decision
- Exhibit B** – Findings of Fact, Conclusions of Law, and Final Judgment
- Exhibit C** – trial transcript excerpts cited above
- Exhibit D** – Ms. Bellamy's October 8th email to Dr. Madrigal
- Exhibit E** – Dr. Madrigal's October 8th email reply to Ms. Bellamy

CERTIFICATE OF MAILING

The undersigned hereby certifies that on the 30 day of November, 2005, they caused a true and correct copy of the foregoing Brief of Appellee to be delivered to the following:

Carvel R. Shaffer
David J. Shaffer
Shaffer Law Office, PC
562 South Main
Bountiful, Utah 84010

Sent Via:

☒ Hand -Delivery
☐ Facsimile
☐ Mailed (postage prepaid)

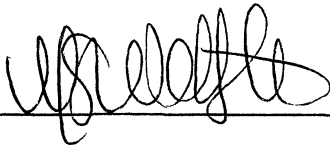


EXHIBIT “A”

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DENIS L. GRAY, MILDA M. GRAY,	:	MEMORANDUM DECISION
TOM HOLLANDER, LA CANADA CREST,	:	
INC., and DALTON PLACE	:	CASE NO. 020915159
ASSOCIATES,	:	
	:	
Plaintiffs,	:	
	:	
vs.	:	
	:	
OXFORD WORLDWIDE GROUP, INC.,	:	
a Utah Corporation,	:	
	:	
Defendant.	:	

This matter was tried to the Court on January 5, 2005, and after having taken the matter under advisement, the Court now finds and rules as follows:

This is an action by plaintiffs for unpaid rent. Plaintiffs also ask the Court to consider physical damages to the premises. The Court did not allow this item of damage as it had not been pled by plaintiffs. Plaintiffs also ask for damages as a result of diminution in the value of the property incurred by plaintiffs when the property was sold in May of 2003, which plaintiffs attribute to the vacancy by the defendants when they left the premises in early November of 2002.

Defendants claim breach of lease resulting from an alleged interference by plaintiffs with defendants' quiet use and enjoyment

of the property which defendants claim amounted to a constructive eviction, and accordingly defendants argue that they are relieved from their obligation to pay rent.

It should also be noted that plaintiffs are seeking unpaid rent, not only from the date defendants vacated the premises in November of 2002 to the date that the property was sold in May of 2003, but also for unpaid rent for the remainder of the lease, which will terminate by its terms in September, 2005.

The Court is of the opinion that plaintiffs are only entitled to seek rent from the date the defendants vacated the premises in November 2002, through the date of sale of the property in May of 2003, a period of seven months. This amount, together with late charges, provided for under the lease would amount to \$15,770.45. The Court will not allow recovery for unpaid rent from the date of sale of the property by the plaintiffs. While plaintiffs claim that their property was diminished in value because of the vacancy, and that therefore the amount received at the sale of the property was less than otherwise might have been received, there was no competent evidence to support this position. The only evidence before the Court was testimony from Ms. Bellamy of the general proposition that income producing properties, such as this, sell for less if there are vacancies in the property. There was no testimony regarding the specifics of this particular transaction,

however. Ms. Bellamy was not involved in the negotiations leading up to the sale of the property, and none of the owners of the property appeared to testify at trial. In addition, the property had numerous vacancies, and indeed at the time the defendants left the premises, there were only three tenants, including defendants, that occupied the premises, which was only a small fraction of the possible number of tenants that could have occupied the building.

For this reason and the other reasons stated in this decision, the Court will restrict plaintiffs to the amount of unpaid rent from November 2002 through May of 2003, as indicated above.

The Court will now turn to the question of defendants' claims that they were constructively evicted from these premises. To support this claim, defendants point to two factual situations. First, they claim that they had difficulty with the parking situation at the building from the time they first occupied these premises in about October of 2000. Defendants understood that they would have exclusive use to the four parking spaces in front of their offices. However, adjoining tenants constantly used those spaces and while this inconvenience was brought to the attention of the property manager, Ms. Bellamy, nothing, according to defendants, was ever done. It should be noted, however, that the defendants continued to occupy the premises for a period of two years, until they vacated in November of 2002. In addition, the

lease agreement between the parties contains a non-exclusive parking provision. The specific terms of the lease provide that there will be no exclusive parking granted to the defendants, and that they would therefore be required to share all parking with all other tenants. Accordingly, this alone cannot be the basis for a constructive eviction.

The culminating event, however, that finally led to them leaving the premises occurred in October of 2002. Defendants sponsored a fiesta for their students, and indeed for the public, on Saturday, October 12. The owners' property manager learned of this fiesta and e-mails went back and forth, and a telephone conversation was held between the property manager, Ms. Bellamy, and the principal of the defendant, Sonia Madrigal. The parties hotly dispute what was said during this telephone conversation. Ms. Madrigal claims that the property manager, Ms. Bellamy, made very serious and hurtful racist remarks to Ms. Madrigal. Ms. Bellamy denies that such remarks were made.

It is undisputed, however, that Ms. Bellamy did call the police to investigate the fiesta. The police reports indicate that Ms. Bellamy advised them that there may be under-age drinking of alcoholic beverages at the party. The police did attend the event to investigate whether under-age drinking was being allowed. According to Dr. Madrigal, this caused quite a stir at the fiesta.

The defendant has strict prohibitions, both in his personal life and in the business, Oxford Worldwide Group, Inc., against the use of alcohol. Indeed, Dr. Madrigal had informed Ms. Bellamy before she instructed the police department to investigate that there would be no alcohol served, and explained to her his own personal standards, and that he had invited many dignitaries to the event, including Governor Leavitt, the Mexican Consulate, and other important individuals. It appears that Dr. Madrigal made it very clear to Ms. Bellamy that there would be no drinking at all, and particularly under-age drinking.

Indeed, Dr. Madrigal had contacted another owner of the business, Mr. Hollander, prior to the event, and had spent an hour and a half with Mr. Hollander explaining the nature of the activity, and had received permission from Hollander to conduct the activity. In spite of this, the police were called to investigate. Ms. Bellamy testified that the call to the police was made because of a call that they had received prior to the fiesta from another tenant indicating that there may be under-age drinking at the upcoming fiesta. It does not appear that any calls were made during the fiesta itself.

The Court is of the opinion that the plaintiffs were not justified in calling the police to investigate this event on the strength of a call from a co-tenant that there may, in the future,

be under-age drinking at the fiesta. Particularly, when prior to the event, the property manager had received a detailed and passionate letter from the defendants explaining the nature of the party, explaining their views regarding alcohol, and further indicating that various dignitaries, including Governor Leavitt, the Mexican Consulate, Peruvian Honorary Consul, Chilean representative in Utah, American Red Cross, and others had been invited, and were going to participate in the activity. Weighing this letter, explaining the nature of the fiesta, against a telephone call from a tenant speculating that there might be under-age drinking at the fiesta (a tenant with whom the defendant had had prior problems regarding parking), suggests to the Court that it was not reasonable for the landlord to call the police to report under-age drinking of alcohol and ask for a police investigation of the activity. Indeed, this suggests to the Court that there may have been some malice, which further indicates to the Court that, indeed, there may have been some hurtful comments made by the property manager during her telephone conversation with Sonia Madrigal.

Inasmuch as the plaintiffs did not testify in this case, there was no explanation as to why the owners would, on the one hand give permission for the fiesta, and then on the other hand order this police investigation.

Dr. Madrigal testified that because of his reputation, and further because of the fact that 90 percent of his customers are L.D.S., that to have a police officer investigate the event for an allegation of under-age drinking was a serious blow to him, personally, and to his business. The principals of the defendants' business met early the week following the fiesta and made a decision to vacate the premises, feeling that they could no longer remain because of the feelings that had developed and their perceived attitude of the property managers and owners toward the defendants.

It should also be noted that Dr. Madrigal testified to an earlier incident where Ms. Bellamy had made a comment that could be interpreted as racial.

The Court finds that under the circumstances, it would have been extremely difficult for the Madrigals to continue to conduct their business at the defendant's location. There was also testimony that the defendants had had very little contact with the property managers and, in fact, had not seen the property managers on the premises in the years that they had been a tenant, and felt that their expressed needs and concerns were not being addressed by the property managers. Part of this may, of course, be due to the fact that the property managers resided in Park City, whereas this property is located in Salt Lake County.

In any event, the Court feels that the defendants were justified in vacating the premises, as their relationship with the landlords and property managers had completely broken down, their business had been impacted, and their reputation had been tarnished.

The Court finds that, therefore, they were constructively evicted. As to the affirmative defense of failure to mitigate damages, the Court notes that under Utah law, the burden to prove a failure to mitigate is on the defendants. There was no evidence submitted by defendants to persuade the Court that the plaintiffs failed to mitigate their damages.

The Court, based on its findings and rulings above, finds for the defendants and rules that the plaintiffs take nothing by their Complaint.

Counsel for defendants is to prepare an appropriate set of Findings of Fact, Conclusions of Law, and a Judgment, and submit them to the Court for signature after approval as to form by opposing counsel.

Dated this 21 day of January, 2005.

15/

FRANK G. NOEL
DISTRICT COURT JUDGE

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Memorandum Decision, to the following, this_____ day of January, 2005:

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David J. Shaffer
Attorneys for Plaintiffs
562 S. Main Street
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Stephen Quesenberry
Attorney for Defendant
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Provo, Utah 84604

EXHIBIT “B”

FILED DISTRICT COURT
Third Judicial District

JUL 12 2005

SALT LAKE COUNTY

By _____
Deputy Clerk

STEPHEN QUESENBERY (8073)
J. BRYAN QUESENBERY (9156)
HILL, JOHNSON & SCHMUTZ, L.C.
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3319 North University Avenue
Provo, Utah 84604
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COPY

Attorneys for Defendant

IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

DENNIS L. GRAY; MILDA M. GRAY;
TOM HOLLANDER; LA CANADA
CREST, INC.; and DALTON PLACE
ASSOCIATES,

Plaintiffs,

vs.

OXFORD WORLDWIDE GROUP, INC.,
a Utah corporation,

Defendant.

**FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND FINAL JUDGMENT**

Case No. 020915159

Judge Frank G. Noel

WHEREFORE, having tried this matter on January 5, 2005, and having taken testimony and evidence at that time, and having heard argument from counsel for both parties at that time, the Court hereby makes the following findings of fact, conclusions of law, and final judgment:¹

¹ The Court's January 21, 2005 Memorandum Decision is hereby incorporated and adopted herein and expressly made a part hereof.

FINDINGS OF FACT

The Court hereby finds as follows:

1. Defendant was a tenant at the premises in question ("Premises") which was owned by Plaintiffs.
2. Defendant, a language training school which primarily caters to Latinos, sponsored a fiesta for its students and the public on Saturday, October 12, 2002 at the Premises.
3. Plaintiffs' property manager, Brenda Bellamy, learned of this fiesta approximately one week before the fiesta.
4. Ms. Bellamy exchanged emails and/or a letter, and phone calls with the principals of Defendant – Dr. Joseph Madrigal and his wife, Sonia Madrigal – regarding allegations of underage drinking at the upcoming fiesta.
5. Dr. Madrigal had strict prohibitions in Defendant's business and in his personal life against the use of alcohol.
6. In fact, Dr. Madrigal informed Ms. Bellamy prior to her call to the police to investigate for underage drinking, that there would be no alcohol served at the fiesta. Dr. Madrigal also informed Ms. Bellamy his own personal standards regarding the consumption of alcohol and informed her that he had invited many dignitaries to the fiesta, including Governor Leavitt, the Mexican Consulate, and other

important individuals.

7. Dr. Madrigal made it very clear to Ms. Bellamy that there would be no drinking at all, including underage drinking.

8. Dr. Madrigal had also contacted Plaintiff Tom Hollander, an owner of the Premises, prior to the fiesta, and had spent an hour and a half on the phone with Mr. Hollander explaining the nature of the fiesta. Mr. Hollander gave Dr. Madrigal permission to conduct the fiesta.

9. In spite of this permission, Ms. Bellamy nonetheless called the police at the beginning of the fiesta, complaining of underage drinking at the fiesta.

10. The police investigated Ms. Bellamy's complaint by appearing at the fiesta and inspecting the fiesta for such underage drinking.

11. The attendance of the police created quite a stir at the fiesta.

12. No phone calls were made during the fiesta itself.

13. Plaintiffs, through Ms. Bellamy, were not justified in calling the police to investigate the fiesta on the strength of a call from a co-tenant that there may, in the future, be underage drinking at the fiesta, especially when Ms. Bellamy received from Dr. Madrigal a detailed and passionate letter explaining the nature of the fiesta, Defendant's views regarding alcohol, and which indicated that various dignitaries had been invited and were going to participate in the fiesta, such as Governor Leavitt, the Mexican Consulate, the Peruvian Honorary Consul, the Chilean representative in Utah, the American

Red Cross, and others.

14. It was unreasonable for Ms. Bellamy to call the police to report underage drinking of alcohol and request a police investigation of the fiesta in light of the letter Dr. Madrigal sent to Ms. Bellamy in comparison to one tenant's speculation that there might be underage drinking at the fiesta.

15. Indeed, Ms. Bellamy's reliance on the tenant's speculation of underage drinking of alcohol over the detailed letter of explanation from Dr. Madrigal suggests that there may have been some malice on the part of Ms. Bellamy.

16. This suggestion of malice supports Defendant's claims that Ms. Bellamy made some hurtful comments to Mrs. Madrigal during their telephone conversation prior to the fiesta.

17. Indeed, Dr. Madrigal also testified to an earlier incident where Ms. Bellamy made a comment to him that could be interpreted as racial.

18. Plaintiffs did not attend this trial to testify on their own behalf, and thus provided no explanation why they would give permission to Dr. Madrigal on the one hand, and then on the other hand order the police investigation.

19. Because of Dr. Madrigal's reputation in the community and because 90% of Defendant's customers are L.D.S, to have a police officer investigate the fiesta based on an allegation of underage drinking was a serious blow to him personally and to Defendant.

20. The principals of Defendant met the week following the fiesta and decided to vacate the Premises at the end of that month because they felt they could no longer remain based on the feelings

that had developed, as well as the attitude of the Ms. Bellamy and the owners of the Premises toward them.

21. Under the above-mentioned circumstances, it would have been extremely difficult for the Madrigals to continue to conduct Defendant's business at the Premises.

22. Defendant had had very little contact with Plaintiffs' property managers and, in fact, had not seen the property managers on the Premises in the years that Defendant had been a tenant. Defendant's principals felt that their expressed needs and concerns were not addressed by Plaintiffs' property managers.

23. Plaintiffs' property managers resided in Park City during the time in question, whereas the Premises is located in Salt Lake County.

24. Defendant was justified in vacating the Premises as its relationship with Plaintiffs and Plaintiffs' property managers had completely broken down, Defendant's business had been impacted, and the reputation of Defendant and its principals had been tarnished.

CONCLUSIONS OF LAW

The Court hereby concludes as a matter of law:

1. Plaintiffs and/or their agents (the property managers) constructively evicted Defendant.
2. Defendant failed to provide evidence of mitigation of damages.
3. Plaintiffs' claims are dismissed with prejudice and shall take nothing by way of their Complaint.

4. Defendant's counterclaims are dismissed with prejudice and Defendant shall take nothing by way of those claims.

JUDGMENT

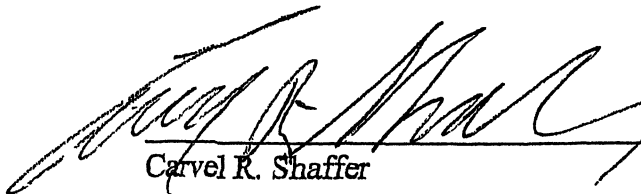
The Court hereby ORDERS and ADJUDICATES that Plaintiffs' Complaint and all their claims therein are hereby dismissed with prejudice, and Plaintiffs shall take nothing thereby, and that Defendant's counterclaims are dismissed with prejudice and Defendant shall take nothing thereby.

DATED this 12 ^{July} day of ~~June~~, 2004.

15 **Deno Himonas**

Judge Robert W. Adkins
for Judge Frank G. Noel

Approved as to form:



Carvel R. Shaffer
Counsel for Plaintiffs

6.16.05

EXHIBIT "C"

~~CERTIFIED~~
COPY

IN THE THIRD DISTRICT COURT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

DENNIS M. GRAY,]	
]	
Plaintiffs,]	Trial Court Case
]	No. 020915159
Vs.]	
]	Appellate Court Case
OXFORD WORLDWIDE GROUP, INC.]	No. 20030665
]	
Defendant.]	

January 5, 2005, 10:02 a.m.

Third District Court
450 South State Street
Salt Lake City, Utah

BEFORE THE HONORABLE FRANK G. NOEL
District Court Judge

Peggy L Grover

CERTIFIED COURT TRANSCRIBER
11541 S. Hidden Valley Blvd.
Sandy, Utah 84092
(801) 571-5206

1 MR. QUESENBERRY: Our case is basically we
2 were constructively evicted. We lost the quiet
3 enjoyment of the premises based on the property
4 manager's conduct, some words that were spoken as well
5 as her lack of-- their lack of attention to our concerns
6 and complaints.

7 THE COURT: What did they do to constructively
8 evict you?

9 MR. QUESENBERRY: Well, for example, Number
10 1: Parking. For the two years that we were there we
11 repeatedly complained that another tenant was taking our
12 parking spots. They were telemarketers and they have a
13 number, a large number, a dozen or so, 10 or 12
14 employees that would work there. They took our parking
15 spots. We repeatedly asked, in fact we went ourselves
16 to-- this is basically the next door tenant--

17 THE COURT: I'll hear that evidence. But did
18 this lease designate the parking that you were to have,
19 the--

20 MR. QUESENBERRY: Yes.

21 THE COURT: --spaces that you were to have?

22 MR. QUESENBERRY: I believe there was
23 something in the lease as well as our conversations with
24 the property manager regarding: This would be no
25 problem. They needed a place to park. Otherwise, our

1 students and our staff would have to park a ways down
2 into the lot. So that's one reason. Another reason is
3 there is-- now, obviously, my testimony today will
4 indicate that Dr. Madrigal, who is the owner and
5 president of the defendant, is Hispanic, he is Mexican,
6 so is his wife. The majority of the students, about 90
7 or 95%, are Hispanic, the majority of them are also LDS.
8 And the property managers have a clear, based on the
9 testimony today, bias or prejudice against Hispanics and
10 Mexicans, and that is going to come out. They used
11 racial slurs, they slandered to our face, in fact.

12 THE COURT: So what claim does that go to?

13 MR. QUESENBERRY: That goes to the breach of
14 quiet enjoyment and it absolutely ruined our two years
15 we were there especially towards the end. There is going
16 to be a lot of testimony regarding a party that we held
17 and how the property managers contacted the police,
18 claiming that there was underage drinking, that there
19 was loud music. There's going to be testimony,
20 deposition testimony, that I intend to use of an officer
21 who is now out the state. That's why we deposed him a
22 week or two ago. And he's going to testify through his
23 deposition that he attended and there was nothing, there
24 was no drinking, no indication of loud music, no
25 indication of underage drinking, all it was was a nice

1 Hispanic party. The testimony is also going to come out
2 later today that we invited dignitaries in the Salt Lake
3 area, the governor's office, different Hispanic groups,
4 different international groups to attend. Some of those
5 did attend. It is absolutely ludicrous that we would
6 have any kind of drinking, let alone underage drinking,
7 and yet-- and the property manager knew this, and yet
8 they contacted the police and the police showed up which
9 caused us distress, mortified us and our students. And
10 so based on those things they have breached the lease.

11 THE COURT: And you are saying that that led
12 to your quiet enjoyment of the premises--

13 MR. QUESENBERRY: It destroyed our-- just we
14 couldn't enjoy our premises. After two years, that was
15 it. This party was the culmination of this poor
16 conduct, unprofessional management of the property.

17 THE COURT: Okay. You left shortly after
18 this?

19 MR. QUESENBERRY: Yes.

20 THE COURT: When was the party?

21 MR. QUESENBERRY: The party was October 12th,
22 2002, and we left at the end of October of 2002. We
23 paid to the end of October 2002.

24 COURT: Any other grounds for constructive
25 eviction?

1 MR. QUESENBERRY: Those are the main ones.
2 There's going to be some e-mails that just support what
3 the evidence would be. Also, I would like to point out
4 regarding some of the damages that are requested by the
5 plaintiffs; namely, physical damages to the property
6 which was just mentioned; that is outside the scope of
7 the complaint. There is no allegation in any pleading
8 regarding those kinds of damages. The only damages--
9 Additionally, there's no-- nothing in any pleading or
10 the complaint regarding lost commission. The only
11 damages that are prayed for, and I have reviewed the
12 complaint very recently, is just this lost rental. And
13 so I would object now is a good time or at the time this
14 comes up that that should-- it is inadmissible, that
15 that is outside the scope of this lawsuit.

16 THE COURT: All right. Thank you. You may
17 call your first witness.

18 MR. SHAFFER: I will call Brenda Bellamy,
19 please.

20 THE COURT: Before you begin, let me just ask
21 this question: From what you have said there is going to
22 be quite a bit of evidence in this case. We have
23 allotted one day for this. Are we still planning on
24 getting this concluded by this afternoon?

25 MR. SHAFFER: I was hoping to get through

1 this morning, quite frankly, with our witnesses.

2 MR. QUESENBERRY: I think it might go into
3 this afternoon.

4 THE COURT: Okay. It will go fairly quickly.
5 All right.

6 MR. QUESENBERRY: It won't go very long.

7 MR. SHAFFER: I would like to respond,
8 though, Your Honor, before we start to his motion, his
9 statement about the damages. It's true, it's not
10 specifically pled in there but I believe the rules do
11 allow for an amendment based on the evidence and that's
12 the way we would proceed.

13 THE COURT: Well, let's see how that goes. If
14 you introduce evidence and it's objected to, then I will
15 make a ruling at that time.

16 MR. SHAFFER: Okay. Thank you.

17 BRENDA BELLAMY,
18 having first been duly sworn, was
19 examined and testified as follows:

20 DIRECT-EXAMINATION

21 Q. (By Mr. Shaffer) Would you please state your
22 name?

23 A. Brenda Bellamy.

24 THE COURT: How do you spell your last name,
25 please?

1 THE WITNESS: B-E-L-L-A-M-Y.

2 THE COURT: Thank you.

3 Q. (Mr. Shaffer) What is your address, please?

4 A. It's 445 Crestview Drive, Park City, Utah.

5 Q. What is your occupation or employment?

6 A. Commercial property manager and real estate
7 sales and leasing.

8 Q. How long have you been employed as a real
9 estate property manager?

10 A. I have been a property manager for
11 approximately 15 years.

12 Q. And part of that company you have owned your
13 own-- And part of that time you have owned your own
14 company; is that correct?

15 A. Yes.

16 Q. How long have you owned your own company?

17 A. Approximately five years.

18 Q. And the name of that company is?

19 A. Bellamy Commercial Property Management, Inc.

20 Q. And based upon that, what are your duties and
21 responsibilities as a property manager?

22 A. We collect rents, pay the bills, file
23 reports, report to the owners, oversee the property,
24 maintenance, make sure everything is taken care of
25 there. Basically take care of the property.

1 Q. And you are employed by Dr. Dennis Gray and
2 Tom Hollander and others to manage properties for them
3 that they own in the State of Utah?

4 A. Yes, sir.

5 Q. And were you employed to manage the property
6 on 3007 South West Temple in Salt Lake City, Utah?

7 A. Yes, sir.

8 Q. Was that property that's the subject of this
9 litigation today where Dr. Madrigal and his company had
10 a lease?

11 A. Yes, sir.

12 Q. Were you involved in that, managing that
13 property from the inception of when these present owners
14 purchased it?

15 A. Yes. I was involved from their inception
16 until about 1998, and then started up again with them in
17 1999, when we started our own business.

18 Q. So during the time that this lease was in
19 effect you were the property manager; is that correct?

20 A. Pretty much, yes, for most of the time.

21 Q. When they leased the building in 2000 you
22 were the property manager?

23 A. Yes.

24 Q. Would that be correct?

25 A. Yes.

1 Q. And were you involved when this lease was
2 signed; do you know?

3 A. Yes.

4 Q. You are familiar with the property, I would
5 assume?

6 A. Yes.

7 Q. And you inspected the property?

8 A. For the most part Chris, my husband and
9 partner, would do the inspections. I worked mostly out
10 of the office. Periodically I would go to the property.

11 Q. Okay.

12 MR. SHAFFER: Your Honor, I think in the
13 complaint they did admit that this lease was an
14 effective lease but I do want to put it in as an
15 exhibit.

16 THE COURT: Thank you.

17 MR. SHAFFER: May I approach, the witness.

18 THE COURT: You may.

19 Q. (Mr. Shaffer) Would you look at that lease,
20 please, and tell me if that's-- if you're familiar with
21 that lease?

22 A. Yes, I am.

23 Q. Were you the property managers at the time
24 this lease was signed in September of 2002?

25 A. Yes.

1 Q. Based on this lease, I would have you,
2 please, turn to paragraph-- well, turn to page 14, if
3 you would, please.

4 THE COURT: What number is this? Number 1?

5 MR. SHAFFER: Number 1, yes, Your Honor.

6 This is--

7 THE COURT: So are you offering Number 1?
8 Before you read from it, I think we need to have it in
9 evidence.

10 MR. SHAFFER: I guess, thank you. Yes, I
11 would offer this.

12 THE COURT: Any objection?

13 MR. QUESENBERRY: No objection.

14 THE COURT: All right. Number 1.

15 [EXHIBIT-1 RECEIVED.]

16 Q. (Mr. Shaffer) If you will turn to page 14,
17 please. Are you familiar with the signatures of Dr.
18 Dennis Gray and Milda Gray, and Tom Hollander?

19 A. Yes.

20 Q. Are they their signatures?

21 A. Yes, sir.

22 Q. The tenant is signed by doctor or by-- It
23 looks like Joseph L. Madrigal. I don't know if that's--
24 and also then the signature below that individually.
25 Were you there when this lease was signed?

1 A. Yes.

2 Q. And have you operated this under the premise
3 that this is a valid lease?

4 A. Yes.

5 Q. By the tenant?

6 A. Yes, sir.

7 Q. Going to page-- paragraph 10. I am sorry,
8 page 10, number 27, are you familiar with that
9 paragraph?

10 A. Yes, sir.

11 Q. And at this property what's the parking
12 situation?

13 A. It's all non-exclusive. There are no assigned
14 parking stalls to any tenant.

15 Q. Was the-- Dr. Madrigal and his company ever
16 authorized for certain parking places?

17 A. Just the non-exclusive use. They could park
18 wherever there was available.

19 Q. Is there ample parking in that facility--

20 A. Yes, there is.

21 Q. --for people?

22 A. Yes.

23 Q. If I could also have another-- well, maybe--
24 Are you familiar with that document?

25 A. Yes.

1 2003?

2 A. Yes, sir.

3 Q. So May 15th, was that the closing date?

4 A. I think it was on or around there.

5 Q. You are aware that there has been some
6 allegations that-- let me back up. You are aware that
7 there was a party held in Suite D of the property on the
8 evening of October 12th, 2002. Correct?

9 A. Yes, sir, I received a notice of it.

10 Q. Okay. And you are aware that there's
11 allegations that there was underage drinking and loud
12 music at that party. Correct?

13 A. Underage drinking, I wasn't aware of that.
14 The music was a concern.

15 Q. So you are saying--

16 A. And drinking was a concern. Underage was
17 never-- never crossed my-- my office.

18 THE COURT: What was the date of the party
19 again? I am sorry.

20 MR. QUESENBERRY: October 12th, Your Honor,
21 2002.

22 Q. (Mr. Quesenberry) You are aware, correct,
23 that Dr. Madrigal is LDS?

24 A. From what I understand, yes, he informed me
25 in an e-mail.

1 Q. --or the majority, even the majority of the
2 students were LDS?

3 A. No. The religion didn't even come across.

4 MR. SHAFFER: Your Honor, I'm going to
5 object. I don't know what this even comes in.

6 THE COURT: Overruled.

7 MR. QUESENBERRY: Your Honor, this goes to--

8 THE COURT: Go ahead. I've overruled.

9 MR. QUESENBERRY: Okay.

10 Q. You agree that you're the agent for the owner
11 of the building. Correct?

12 A. Yes, sir.

13 Q. You and your company?

14 A. Our company, yes, sir.

15 Q. Do you agree that on the evening of October
16 12th, 2002 you contacted the police and reported some
17 kind of drinking incident at the Suite D, Oxford Suite
18 D, don't you?

19 A. I contacted the police and reported a
20 concern, asked them to check it out. I did not have any
21 firsthand knowledge of the drinking. We received a call.

22 Q. Was it drinking only or was it also loud
23 music that you reported?

24 A. Music and the potential drinking.

25 Q. You said you had no firsthand knowledge.

1 A. No.

2 Q. So you never went there and inspected for
3 yourself?

4 A. No, sir.

5 Q. And you never called Dr. Madrigal, you didn't
6 ask what was going on, did you?

7 A. Okay. If I could explain.

8 Q. I just-- you can't explain. Just yes/no, was
9 the question.

10 A. Okay. I didn't call Dr. Madrigal. I called
11 Sonja.

12 Q. Okay.

13 A. I called their facility.

14 Q. The evening of October 12th.

15 A. Yes.

16 Q. That evening your testimony is that you
17 called Sonja?

18 A. Yes, I called and talked to her, someone who
19 answered the phone and then I talked to Sonja, explained
20 that parties aren't allowed.

21 Q. And it is crystal clear in your mind that
22 that call was October 12th, the evening of the party?

23 A. Yes, sir.

24 MR. QUESENBERRY: What exhibit number are we
25 on?

1 THE CLERK: Nine.

2 MR. QUESENBERRY: So the next one is 10, the
3 one we're doing right now? This will be 9. This is a
4 courtesy copy.

5 THE COURT: Thank you.

6 Q. (Mr. Quesenberry) I have handed you what is
7 now marked as Exhibit Number 9. At the top it says
8 Brenda and Chris Bellamy, it purports to be an e-mail.
9 Have you ever seen this before?

10 A. Yes, sir.

11 Q. Is this an e-mail that you sent to-- it looks
12 like from Brenda and Chris Bellamy to Oxford Group, Dr.
13 Joseph Madrigal, sent Tuesday, October 8th, at 5:00 p.m.
14 Is this an e-mail that you sent to those people at that
15 time?

16 A. Yes, sir.

17 Q. It looks like at the bottom there is
18 somebody's stylized signature, it's your name, and some
19 contact information. Why don't you--

20 THE COURT: Are you going to offer it?

21 MR. QUESENBERRY: Yeah, pardon me. I move to
22 admit Exhibit 9.

23 THE COURT: Any objection?

24 MR. SHAFFER: No.

25 THE COURT: Nine is received. Go ahead.

1 [EXHIBIT-9 RECEIVED.

2 Q. (Mr. Quesenberry) I want you to read some of
3 the middle paragraph there. Why don't you start with
4 "Also."

5 A. "Also, I need to address a concern we have in
6 your office having parties at the property and turning
7 your warehouse into a bar serving alcohol, charging a
8 cover charge."

9 Q. You can stop right there.

10 A. Okay.

11 Q. How many parties had they had at the property
12 at this time?

13 A. I had received complaints--

14 Q. I'm--

15 A. I can't tell you because I have never been
16 there when they have had a party. I am just telling you
17 that I have received complaints from other tenants
18 reporting that there's been partying and noise.

19 Q. And you say here, "--that turning your
20 warehouse into a bar serving alcohol." What firsthand
21 knowledge do you have regarding any kind of alcoholic
22 beverages ever being served at Oxford, Suite D.

23 A. Complaints from the tenants saying they were
24 told.

25 Q. Okay.

1 office is passing around to the public-- excuse me--
2 --public and the other tenants inviting them to a
3 festival where you are advertising that you are having a
4 lot of music and dancing and we have received word that
5 you will be serving alcohol, which is against the law."

6 Q. Again, I presume this word came from a
7 tenant?

8 A. Yes, sir.

9 Q. At this time how many tenants occupied the
10 building? Isn't it true that there was just three
11 including the Oxford Institute tenants at this time?

12 A. There could have been. I couldn't tell you. I
13 don't have my records.

14 Q. Okay. Isn't it true that you have never,
15 aside from this e-mail, confronted or contacted either
16 of the Madrigals or anyone at Oxford regarding alcoholic
17 beverages?

18 A. Before I e-mailed Dr. Madrigal I tried to
19 call and talk to Sonja and I did talk to-- and I
20 apologize, I was wrong on the date earlier.

21 Q. Okay. So your testimony now is that you
22 talked to Sonja on--

23 A. This day.

24 Q. On Tuesday, October 8th? Correct?

25 A. Yes. I apologize. And I tried to tell them

1 it's not allowed, the owners have not authorized any
2 parties. It's a liability. So I had a responsibility to
3 check into it. So I tried calling them first to tell
4 them that, you know, the owner didn't authorize it, we
5 have a liability, they can't have a party on the
6 premises. And they basically said: "Too late. We are
7 doing it."

8 Q. Okay.

9 A. And that's when I e-mailed Dr. Madrigal to
10 see if he could help us get it stopped because if
11 something happened to somebody the owner is liable.

12 Q. So that was your concern?

13 A. Yes. Absolutely. I talked to the owner first.

14 Q. You are aware that the lease contains a
15 provision requiring the tenants, Oxford, to obtain
16 insurance, premises insurance. Correct?

17 A. Yes. That's for the leased premises, not
18 outside the premises.

19 Q. Okay. So you are aware, though--

20 A. Yes, sir.

21 Q. --that there is an insurance policy that they
22 had?

23 A. Yes, sir.

24 Q. So the day of the party, Saturday, October
25 12th, when you received-- when were you contacted

1 supposedly by this tenant complaining of partying, loud
2 music, drinking?

3 A. Okay. They contacted me first, it was about
4 September 6th, saying that they're having problems--

5 Q. I don't want what they said. I just want to
6 know when they contacted you?

7 A. The first call was September 6th.

8 Q. Okay. How about this week, starting from
9 Tuesday until Saturday, the party, when were you
10 contacted?

11 A. It was Tuesday the 8th, the day I responded,
12 because this is the first day I heard of the party, that
13 they were going to have the festival.

14 Q. And they didn't call you that Saturday, did
15 they, and report to you that there was any drinking or
16 partying, did they?

17 A. No, because they knew I had-- I was taking
18 care of it. I told them I would call the police and ask
19 them to check it out. They asked us to look into it.

20 Q. Okay. So you--

21 THE COURT: This was on the 8th?

22 THE WITNESS: Yes, sir. They contacted me on
23 the 8th and faxed me a copy of the flyer from the
24 tenant.

25 Q. (Mr. Quesenberry) And your testimony is that

1 on the 12th, the day of the party, no tenant contacted
2 you and reported underage drinking or partying; isn't
3 that right?

4 A. To my recollection, I don't recall if I had
5 anyone call on that date.

6 Q. And on that date you never contacted the
7 office, or the Madrigals, or anyone at Oxford on the day
8 of the party and asked any kind of question about: Is
9 there drinking going on there or is there loud music;
10 isn't that right?

11 A. That day, no, not that I can recall. Now--

12 Q. That's my only question.

13 A. Okay.

14 Q. Dr. Madrigal responded to your October 8th
15 e-mail; isn't that correct?

16 A. Yes, sir.

17 Q. And you never did reply to his e-mail, did
18 you?

19 A. Not that I can recall. It has been quite
20 awhile.

21 THE COURT: How did you know about the party
22 on the 12th if no one called you?

23 THE WITNESS: The tenant called me, the
24 neighboring tenant called me and faxed me a copy of the
25 flyer.

1 THE COURT: This was on the 8th?

2 THE WITNESS: On the 8th. And said, "I don't
3 know if you're aware that they're planning a party and
4 we're concerned about noise," because they couldn't
5 conduct their business.

6 THE COURT: So you sent this e-mail.

7 THE WITNESS: After I tried to contact their
8 office.

9 THE COURT: Okay. And then how did you know
10 that they were having a party on the 12th?

11 THE WITNESS: At the festival the owner asked
12 me to call the police and ask them to check it out. And
13 then also--

14 THE COURT: The owner of the building?

15 THE WITNESS: Yes, sir.

16 MR. QUESENBERRY: Objection. That's hearsay.

17 THE COURT: Well-- I don't imagine it's
18 offered for the truth. I just wanted to know if anyone
19 called her and spoke to her on the 12th.

20 THE WITNESS: A tenant did call, I don't know
21 if it was the 12th, it was later, saying that their cars
22 were blocked in.

23 MR. QUESENBERRY: Objection. That's hearsay,
24 Your Honor. Whatever the tenants say, that's hearsay.

25 THE WITNESS: Well, if they're filing a

1 drinking?

2 THE WITNESS: No. No, because they had already
3 reported it.

4 Q. (Mr. Quesenberry) four days earlier on the
5 Tuesday?

6 A. No one complained about the party, or
7 anything, they called to say they were blocked in and
8 couldn't get their cars out and they had to come back on
9 Sunday.

10 Q. Okay. You are aware that the police did
11 attend or did show up at the party and inspected, aren't
12 you?

13 A. I heard.

14 Q. Okay.

15 A. I didn't talk directly to them, no.

16 Q. And you are aware that they found no
17 evidence, absolutely no evidence of alcoholic beverages?

18 A. I heard that, yes.

19 Q. And no evidence of loud music?

20 A. I didn't hear anything on that.

21 THE COURT: Do you-- I just want to make sure
22 I got this straight. You did call the police on the day
23 of the party?

24 THE WITNESS: I did. The owner instructed me
25 to.

1 submitted evidence in the court. I--

2 THE COURT: Well, it's in the file but it is
3 now being offered as an exhibit in the trial. Do you
4 have any objection?

5 MR. SHAFFER: I do. I don't think it is
6 appropriate. I think he can ask what questions he wants
7 to ask her. This affidavit is not appropriate to be
8 offered at this time. If he wants to ask her a
9 question, let him go ahead and ask her pertaining to
10 what she said.

11 THE COURT: Overruled. Go ahead.

12 Q. (Mr. Quesenberry) Okay. You understand, you
13 can see underneath your name it has been notarized and
14 this is a legal document?

15 A. Yes, sir.

16 Q. You understand that. Look at paragraph No. 8
17 and paragraph No. 9. Why don't read paragraph 8 for me.

18 A. "Plaintiffs were advised by other tenants that
19 defendant on or about the 12th day of October held an
20 authorized party-- unauthorized party on the premises."

21 Q. Paragraph 9.

22 A. "It was represented to plaintiffs by other
23 tenants of the premises that alcohol was served at the
24 party which was illegal and the police were called as a
25 result of nuisance created by the noise level. Affiant

1 is aware that on at least one occasion beer bottles were
2 found on the premises."

3 Q. When you say "on the premises," are you
4 referring to Suite D, Oxford's Suite D on the premises?

5 A. At the rear, yes.

6 Q. At the back of their premises?

7 A. Yes, sir.

8 Q. And so you, yourself observed beer bottles?

9 A. No, not personally. My partner did and the
10 tenants.

11 Q. So you have no firsthand knowledge then?

12 A. No, sir.

13 Q. Of beer bottles on the premises.

14 A. No, sir.

15 Q. Did--

16 THE COURT: Did tenants call and say that
17 alcohol was being served at this party on the 12th of
18 October?

19 THE WITNESS: Well, they-- No, they said
20 that they were told that alcohol would be served. It
21 wasn't in the flyer. They said when they handed out the
22 flyer that's what they were told. And previously they
23 had reported drinking at the premises. Well, they went
24 out and cleaned up beer bottles outside their premises.

25 THE COURT: What exactly did you mean when you

1 Fifteen-- Did I understand 50 North?

2 A. 1341 West 1460 North, Provo, Utah.

3 Q. What's your education?

4 A. I have a PhD in statistics from the
5 University of Oxford in England.

6 Q. I understand you are employed at BYU; is that
7 correct?

8 A. Yes.

9 Q. And you are the Dr. Madrigal that is
10 Worldwide, Oxford Worldwide Group?

11 A. Correct.

12 Q. Is that a corporation?

13 A. It is a limited liability company.

14 THE COURT: I think you are a little bit too
15 close to the mike. I think if you stay right there we
16 would be able to hear you fine.

17 Q. You signed a lease where you rented this
18 Suite D at the space at 3007 South West Temple, Suite D,
19 Salt Lake City, Utah; is that correct?

20 A. Correct. Yes.

21 Q. Would you turn to that lease. I think it's
22 Exhibit Number 1.

23 A. Yes, sir.

24 Q. And you were familiar with the terms and
25 conditions of that lease at the time?

1 THE COURT: Well, is it all one incident
2 report?

3 THE WITNESS: Right. It is completely
4 formatted, computer generated populated fields are kind
5 of automatic other than the call-taker comments which
6 would be the narrative that I would enter per the
7 complainant's question.

8 THE COURT: Okay.

9 THE WITNESS: At the time of call.

10 THE COURT: I will receive it.

11 MR. QUESENBERRY: Okay.

12 [EXHIBIT-11 RECEIVED.]

13 Q. (Mr. Quesenberry) Let's look at some of the
14 different information that you have. You said you took
15 the call at what time?

16 A. 1719.

17 Q. So that would be 5:19 in civilian folks time?

18 A. Uh-huh.

19 Q. Okay. At 5:19 you took the call and who did
20 you take the call from?

21 A. The complainant's name would be Brenda
22 Bellamy.

23 Q. Okay. And I think it's on the second page.
24 What was the nature of the call?

25 A. The nature of the call was that she was

1 concerned that there was underage drinking at this
2 address and she wanted the police to go out and check
3 into it.

4 Q. Okay. So now not just drinking but--

5 A. Alcohol.

6 Q. Is it your recollection it was underage?

7 A. It was underage.

8 MR. SHAFFER: Objection. Leading.

9 THE COURT: Well, just a moment. I am
10 sustaining the objection as to leading.

11 MR. QUESENBERY: Okay.

12 THE WITNESS: The specification was I put
13 underage juvenile getting alcohol from this location.

14 Q. (Mr. Quesenberry) Why don't you read for me,
15 there's a call taker comments at the bottom of the
16 second page of this exhibit.

17 A. Okay. This says Oxford Institute. "The
18 complainant is the property manager. Management thinks
19 that they are having an event with underage juveniles
20 getting alcohol. Complainant is afraid for liability.
21 Wants officers to check on it. No contact unless
22 necessary." And then it's time stamps it. That's the
23 only thing that I did with this call and then it got
24 relayed over to the South Salt Lake Police Dispatcher
25 who put a police officer on it.

1 testimony-- do you you remember her saying that underage
2 juveniles getting alcohol?

3 A. Uh-huh. Yes.

4 Q. How do you remember that if your memory
5 (inaudible) was this?

6 A. Well, I remember this call.

7 Q. Do you remember every call?

8 A. I don't remember her voice. I don't remember
9 the specific nature of her voice but when I looked at
10 this call I remembered taking it.

11 Q. Tell me what she said.

12 A. Just what I put down.

13 Q. That's all she said?

14 A. Uh-huh. There's a few more ands, or buts in
15 it but--

16 Q. She said she thinks, she doesn't make any
17 allegations, just said she thinks there may have been.

18 A. That's right.

19 Q. She just wanted you to check it out because
20 they were concerned for liability purposes?

21 A. That was her-- that was the complainant's
22 terminology, not mine.

23 Q. And after you generated this you just passed
24 it on to another dispatcher and they-- you didn't pass
25 it on to the police?

1 remain. You don't want them any further, do you Mr.
2 Shaffer?

3 MR. SHAFFER: No, I don't.

4 THE COURT: Okay. You are free to go.

5 DR. JOSEPH MADRIGAL,
6 having previously been sworn, was
7 examined and testified as follows:

8 DIRECT-EXAMINATION

9 Q. (By Mr. Quesenberry) Would you state your
10 name and your current occupation for the record.

11 A. Yes. My name is Joseph M. Madrigal. I am--
12 My occupation, I am a professor of statistics at BYU,
13 Brigham Young University and also the president of the
14 Hispanic General Commerce.

15 Q. And what kind of doctorate do you have?

16 A. Doctor in statistics.

17 Q. What nationality are you?

18 A. Originally I am Mexican but now I'm U.S.
19 citizen.

20 Q. How long have you been teaching at BYU?

21 A. For, let's see. August 14, 1999.

22 Q. 1989 or 1999?

23 A. No, '89.

24 Q. All right. Besides being a professor at BYU,
25 you just mentioned you are a member of the-- was it the

1 Hispanic--

2 A. I am president of South Central Utah Hispanic
3 General Commerce.

4 Q. Are you a principal or director of any other
5 groups or organization?

6 A. I am a member of the Board of the Provo
7 General Commerce and I'm also a member of the Board of
8 the Provo City Library, and I have other assignments and
9 Oxford Worldwide.

10 Q. Any national organizations?

11 A. Yes, I'm vice president of the American
12 Society for Equality, National.

13 Q. Okay. What about any state or Utah
14 organizations or associations?

15 A. Provo General Commerce, Provo City, Member of
16 the Board of the Library.

17 Q. What is your position with the defendant
18 Oxford Worldwide Group?

19 A. I am a partner, general partner of the
20 company and I act as president.

21 Q. Okay. President. Good. What services does
22 Oxford-- and I'm just going to refer to it as Oxford,
23 for short, Oxford, the defendant. What services does
24 Oxford provide?

25 A. Oxford Institute provides teaching for

1 languages in eight different languages. We also provide
2 services to the community, we help with taxes, filing
3 their taxes, we help also the police. We teach classes
4 for the police.

5 Q. Do you charge the police?

6 A. No, it's free, it's a community service that
7 we provide.

8 Q. Where do you do that at?

9 A. Provo Police Department, Orem Police
10 Department, Murray Police Department, and Salt Lake City
11 Police Department.

12 Q. Okay. When did you, if you recall, did you
13 found Oxford? Do you remember about when?

14 A. We started Oxford Language Institute in May
15 1st, 1996.

16 Q. Okay.

17 A. And then in 1998, December, we changed it to
18 Oxford Worldwide Group, a corporation.

19 Q. What language do you primarily teach?

20 A. English to the Spanish speaking people.

21 Q. What percentage of your students would you
22 say are Hispanic?

23 A. It's 95 percent, most of them.

24 Q. Ninety-five percent?

25 A. Ninety-five percent are Spanish.

1 Q. Okay. Do you focus, or cater, or advertise to
2 any specific demographic of people? I don't know if that
3 makes sense or not.

4 A. Well, because most of our students there are
5 Hispanics, I mean we have authorization from the
6 Department of Justice to accept the students with visas.
7 So we have authorization from them. So what we have, we
8 have representatives in LDS stakes throughout the world.

9 Q. Okay. What percent of your students are LDS?

10 A. Ninety percent as well.

11 Q. Does Oxford require any of its students to
12 sign any kind of agreement or contract before they begin
13 taking classes?

14 A. Yes. We do have conditions for enrollment.

15 Q. I will hand you Exhibit No. 12. Is that 12?..
16 Do you see that sticker, the blue sticker? What does it
17 say? Twelve?

18 A. Twelve.

19 Q. Okay. Do you recognize this document?

20 A. Yeah, I do.

21 Q. What it is?

22 A. This is any student that apply to our
23 institution need to sign this document. They need to
24 read it and sign it.

25 Q. Okay. Did you draft this up?

1 agreement stating that they won't drink and they won't
2 do anything like that. It just goes to this idea that
3 it's preposterous that there is any kind of drinking
4 going on.

5 MR. SHAFFER: Well, I don't think that
6 that's-- I don't think the fact they sign this is saying
7 there is or isn't drinking going on. I just think the
8 relevance has not been established.

9 THE COURT: Okay. Well--

10 MR. SHAFFER: Anybody can sign an honor code.
11 That doesn't mean they are not going to do it. I don't
12 see that this is worth any relevance.

13 THE COURT: Well, I think it may have some
14 relevance for what it is worth, obviously, but it has
15 some relevance.

16 Q. (Mr. Quesenberry) Dr. Madrigal, would you
17 read that first under, "I understand that."

18 A. "It is prohibited to smoke, consume any type
19 of alcoholic beverages, and any other illegal substance
20 in the confines of Oxford Institute."

21 Q. What would happen if you would find a student
22 that was consuming alcoholic beverages on your property?

23 A. We would expel them.

24 Q. Let's talk now about this lease. I believe it
25 Exhibit 1 in front of you. It's kind of a thick one.

1 A. For MS, yes.

2 Q. Do you recall around Columbus Day, October of
3 2002, Oxford having a party?

4 A. Yes.

5 Q. Do you remember what day that was on?

6 A. Saturday, October the 12th.

7 Q. Okay. What kind of party was it?

8 A. It was a party to celebrate a Hispanic--
9 Christopher Columbus Day. Actually, that's for
10 Hispanics.

11 Q. Did you attempt to obtain any kind of
12 permission from the owners or anyone for this party?

13 A. Yes, I did.

14 Q. How did you go about trying to get permission
15 for this party?

16 A. Well, in October 8th, after Mrs. Bellamy, she
17 called my wife, and based on flyers that were mentioned
18 before, and then she sent an e-mail and in the e-mail it
19 was all nice.

20 Q. Okay. Well, before we get to that, I'm going
21 to show you the e-mail. I just want to know how did you
22 try and get permission to go ahead.

23 A. Well, essentially, when I get the e-mail I
24 was very upset. It was the first time in my life what
25 she wrote in there something was telling me in all my

1 life--

2 Q. Okay.

3 A. So what I decide to do was to call directly
4 Mr. Hollander. And I sent a copy of the e-mail to her
5 and Mr. Hollander and then I called Mr. Hollander the
6 next day and I asked if he has read my e-mail. He said,
7 "No, I have not yet--"

8 MR. SHAFFER: Your Honor, I'm going to object
9 to what he-- his testimony. Mr. Hollander isn't here.

10 MR. QUESENBERRY: And Mr. Hollander is a
11 party plaintiff.

12 THE COURT: Overruled.

13 THE WITNESS: So I called him the next day,
14 that was October 9th, and I asked him if he received my
15 e-mail. He said, "No, I haven't." So I said, "Would you
16 please give me a fax and I will fax it." And that's what
17 I did. And then I told him, "Please read it and I will
18 call you in two hours." And that's what I did.

19 Q. Let's look at that e-mail then that you're
20 talking about. Was it an e-mail that you received from
21 Mrs. Bellamy or was it an e-mail that you sent to Mrs.
22 Bellamy, just so I understand. Let me show you. What
23 e-mail do you recall?

24 A. It was an e-mail that I sent to Mrs. Bellamy
25 and Mr. Hollander.

1 [EXHIBIT-13 RECEIVED.]

2 Q. (Mr. Quesenberry) Dr. Madrigal, is this the
3 e-mail that you were just talking about that you faxed
4 to Mr. Hollander?

5 A. Yes, this is the one.

6 Q. Okay. I think we were talking about then you
7 called him on the phone?

8 A. I did.

9 Q. Okay. And what did he say?

10 A. The first thing that I did when I talked to
11 him was to talk to him about this document and indicated
12 to him that I was very upset, extremely upset because of
13 the innuendo it was written here for me and then after
14 that he--

15 THE COURT: When you say you were upset ~~At~~
16 the innuendo, are you still talking about the e-mail you
17 received from Brenda Bellamy that we've already seen in
18 evidence here today? That's exhibit No. 9. I just want
19 to make sure.

20 THE WITNESS: Yes. This is the same.

21 THE COURT: Okay. Go ahead.

22 Q. (Mr. Quesenberry) Just so we understand, so
23 Exhibit 9, is that the e-mail that you received from--

24 A. That is the one, yes.

25 Q. That you found offensive and upset you?

1 A. Yes.

2 Q. That you received?

3 A. Correct.

4 Q. Then you responded to that in Exhibit--

5 A. Number 13.

6 Q. Number 13. And what did Mr. Hollander have to
7 say about that?

8 A. He indicated to me that he received a call
9 about the party from Mrs. Bellamy and then I explained
10 to him what we were doing, and so forth, and I was
11 talking to him for an hour and a half and at the end he
12 said, "That's fine. You go ahead and have your party but
13 it's your responsibility." He told me that. So he gave
14 me that authorization. He talked to me about the
15 liability, he did, and I explained to him, you know,
16 what I was going to do. And he said, "That's fine, you
17 go ahead and do it." So he gave authorization to have
18 that party to held that party. That's why we hold it.

19 Q. Okay. Good. Had you held any kind of party
20 like this before in the previous two years at Oxford?

21 A. No, never.

22 Q. Let's look now at Exhibit 13 and see what
23 your response was to Mrs. Bellamy, her e-mail. And this
24 says-- it looks like it's October the 8th, so it's the
25 same day as Exhibit Number-- her e-mail, which is

1 Exhibit 9. Why don't you read your response. Let's see.
2 Why don't you read that first paragraph where you say,
3 "Brenda."

4 A. Which exhibit?

5 Q. On Exhibit 13.

6 A. Yes. Also--

7 Q. No. "What are you talking about?" Do you see
8 that at the very top?

9 A. Oh, yes. You want me to read it?

10 Q. Yes, please read that.

11 A. "Brenda. What are you talking about? It
12 sounds like you have not checked the facts. Once again,
13 your e-mail is insulting and upsetting. We are members
14 of the Church of Jesus Christ of Latter-Day Saints,
15 hence we don't drink or involved in promoting any
16 activities in which those types of beverages are served.
17 It is unfortunate that a few times you have talked to me
18 it is to request something, never to ask us how we are
19 doing; in other words, no customer service at all."

20 Q. Okay. Then I want you to look down there at
21 the bottom and this is the only other part I want you to
22 read and then we'll move on, where it says, "Answer,"
23 toward the middle bottom, "Why are you making these
24 accusations?"

25 A. "Why are you making those accusations. What's

1 the matter with you? Do you check the veracity of the
2 lies you are sharing?" And I said, "Are you in
3 something or what? For your information, my wife talked
4 to Peggy a few weeks back. She explained her the purpose
5 of the activity out of courtesy because we are a school,
6 hence we could have activities with our students. That
7 shouldn't be a problem. The activity that we would have
8 on October 12th is to celebrate Columbus Day. In my
9 position as president of the South Central Youth and
10 Hispanic General Commerce, professor at BYU, and well
11 known person in our community. Do you think that I would
12 do anything as stupid as you mentioned in your e-mail?
13 By the way, I personally invited Governor Leavitt to
14 attend our activity. In addition to him, there are
15 several organizations and/or VIPs, such as the American
16 Red Cross, Mexican Consulate, Peruvian Honorary Consul,
17 Chilean representative in Utah, Firefighters, United
18 Way, International (Inaudible) Kennedy Center that will
19 participate in this activity."

20 Q. Okay. Did you ever receive a response back
21 from Ms. Bellamy regarding the e-mail?

22 A. No, I didn't.

23 Q. Did any of those people, I'll call them
24 dignitaries that you invited, did any of them attend?

25 A. Yes.

1 Q. Who attended?

2 A. We had the Director of Hispanic Affairs,
3 Patricia Medina, who was representing Governor Leavitt.
4 We also have the representative of the president of the
5 Red Cross attended. We have the Mexican consulate that
6 he went in there, too. And we have attendance
7 (inaudible). We have attendance from Peru, a Peruvian
8 representative, a Chilean representative.

9 Q. And those people all attended that party?

10 A. Oh, yes. Correct.

11 Q. Saturday evening?

12 A. Correct.

13 Q. Okay. Before this party, had you had any kind
14 of problems either with Mrs. Bellamy or other tenants at
15 the building?

16 A. Yes. We have-- we started leasing October
17 2000 and then what happened was that in the first few
18 days that we started we didn't find any parking and when
19 we took possession of the property Mrs. Bellamy told me
20 that the four spaces in front of our suite, or the door,
21 they were ours. And, therefore, because of that in the
22 first few days our neighbors, the Multiple Sclerosis
23 people, they were taking all our places. So I complained
24 to her. I called her immediately.

25 Q. What was her response?

1 A. She says, "Okay. Let me see if I can do
2 something." But she never did anything.

3 Q. Let me see. So you said that would be in
4 2000. What about the year 2001, how many times do you
5 recall complaining to Mrs. Bellamy about this parking
6 problem?

7 A. Probably two or three other times. I mean
8 once I invited one of the former tenants in E, Mr.
9 Lattimer, I explained. He said, "I have the same
10 problem." So he went with me and we talked to the
11 manager in Suite E. And the problem wasn't solved. I
12 mean it continued the same.

13 Q. So then in 2001 you said a couple or three
14 times. What about in 2002, did you complain again?

15 A. No. I mean we had stopped complaining
16 because--

17 Q. You stopped complaining?

18 A. As I said, it was the same way.

19 Q. Was the parking problem ever resolved?

20 A. No.

21 Q. What was her demeanor toward you during these
22 interactions that you had when you complained about the
23 parking?

24 A. I always felt that she was-- her comments to
25 me were sarcastic sometimes and I remember once that she

1 mentioned that we Hispanics were all the same. And I was
2 very upset with her so I avoid contact with her.

3 Q. So when--

4 A. In any--

5 Q. You just said a specific comment where she
6 said--

7 MR. SHAFFER: I believe he's leading here now,
8 Your Honor.

9 MR. QUESENBERRY: I'm just going to get
10 foundation of when it was. I'm trying to narrow it to
11 that comment.

12 THE COURT: Overrule the objection. Go ahead.

13 Q. (Mr. Quesenberry) She said, "You Hispanics
14 something," when did she make that comment?

15 A. I think it was in 2000. I mean it was prior
16 to the parking problem that we were having.

17 Q. Okay.

18 A. So I was essentially getting very tired of me
19 calling her and she never did anything.

20 Q. And what did she--

21 A. Even the-- (inaudible).

22 Q. What did she say about, "you Hispanics."

23 A. That we're all the same. I mean we don't
24 know--

25 MR. SHAFFER: Your Honor, I object.

1 A. In the afternoon around 5:00, 5:15.

2 Q. And what time did it finish?

3 A. Ten.

4 Q. Okay. What about music? Was there any music
5 there?

6 A. When we-- Outside in the parking lot we have
7 some booths and so there were people selling some--

8 Q. When was the music? When I guess?

9 A. We started the music like 8:30 p.m.

10 Q. Okay.

11 A. Because we have a project, so that was the
12 part, the last part of the celebration.

13 Q. Okay.

14 A. We elected the Ms. Columbus person.

15 Q. Do you recall anything unusual happening at
16 the party?

17 A. No.

18 Q. Do you recall a policeman showing up?

19 A. Oh, yes. He talked to us.

20 Q. Do you remember about when that was?

21 A. Like six, something after that we started.

22 Q. Okay. And why did he show up?

23 A. I don't know. I was very upset and
24 embarrassed.

25 Q. Did he say what he was investigating?

1 A. Oh, yes. Yes, he asked for who was
2 responsible for the activity? And I was across to the
3 entrance and I said, "I--" I identified myself and I
4 said, "I'm Dr. Madrigal. I'm the person responsible." So
5 he explained to me that he was there because he received
6 a phone call saying that we were having some underage
7 drinking and he was there to investigate. So I
8 invited-- He was in and I show him everything even in
9 the back. We went all the way back.

10 Q. Okay. What did you observe with him as you
11 walked him around?

12 A. Well, personally I was very embarrassed, I
13 mean, you know, the Hispanics, I mean we're U.S.
14 citizens. And we're I would say different from probably
15 the typical stereotype for a Mexican, what I talk about
16 Mexicans. We're very different because we are more
17 educated. And the people that was around me what we
18 invite, they were nervous, obviously, to see the police.
19 So it was very embarrassing.

20 Q. Did they kind of gather around the police
21 officer--

22 A. Oh, yes.

23 Q. --to hear what he was talking about?

24 A. Oh, yes. To hear what he was saying.

25 Q. Do you recall if he found any alcoholic

1 because they went out for a break.

2 Q. Uh-huh.

3 A. And they were drinking there.

4 Q. And, again, you testified at the end of
5 October you, Oxford, left the property. Was there any
6 kind of financial impact on Oxford from leaving the
7 property?

8 A. Absolutely.

9 Q. What? What happened?

10 A. Essentially what happened was we sent a
11 letter to our students and we indicated the reason why
12 we were leaving and at that point in time we have 30
13 students, we are a student business, and each of them
14 was paying \$1350 per month, I mean per term, and they
15 have student visas with us. But because it was our
16 problem, because of the problems we were having with the
17 manager, property manager, we let them choose to go with
18 us to our-- another office in Orem, or we could transfer
19 them to other schools. From those 30 students that we
20 have, 14 or 15 of them, they choose to stay here in Salt
21 Lake City. So we lost \$2700 times 15, \$40,000. So we
22 definitely, we didn't want to leave that property. That
23 was a fact. I mean it was my experience with Brenda, the
24 way that she referred to us, it was so upsetting to me
25 that I couldn't handle it anymore.

1 Q. Did you approve the flyers?

2 A. Yes, we did.

3 Q. Did you personally approve the flyers that
4 were going out?

5 A. Oh, yes.

6 Q. You were inviting other people besides the
7 students?

8 A. Oh, yes. That was an activity. It was a
9 festival for Hispanic people with dignitaries invited to
10 celebrate Columbus Day.

11 Q. How many approximately attended?

12 A. Not too many. Probably 80, less than 100, 85.
13 There weren't too many people because when the police
14 came some of them left, for your information, they were
15 scared. Some of them left the party.

16 Q. The policeman didn't ask anybody to leave,
17 did he?

18 A. No. They were just scared because of the way
19 Hispanics are about the police prior on.

20 Q. The police didn't exert any authority, do
21 anything other than walk around?

22 A. No, absolutely. But you need to understand
23 the Hispanic people.

24 Q. I'm just saying all he did was walk around?

25 A. Correct, yes.

1 Line 20. "What was the response you got?"

2 His answer: "I met with-- a Hispanic
3 gentleman made contact with me."

4 Line 25: I asked him: "What generally were
5 the type of people that were at the party? What was
6 their appearance; age, how did they look?"

7 On Page 6 his answer: "I mean-- I remember
8 approaching children, juveniles, I don't know, seven or
9 eight teenagers and a few adults."

10 Down on line 21, I asked him, "What questions
11 did you ask this individual who was in charge?"

12 His answer on line 23. "I didn't-- I
13 identified myself, told him I was here for a report of a
14 loud party and juveniles drinking alcohol and can I
15 check the area for those particular things?"

16 And the next page, page 7, line 2 or line
17 1. "I spoke with-- What was his response?"

18 The officer's answer: 'Sure.' I looked in his
19 office. There was kind of a room with a table and party
20 favors and soda pop and cookies, and food and stuff
21 around. I was able to walk through the entire facility.
22 I never saw alcohol or juveniles consuming alcohol."

23 Now, at the bottom of that page, line 25, I
24 asked: "Were there any loud noises, or music, or
25 anything like that?"

1 Line 2 of page 8, his response: "I don't
2 recall. I don't know what was considered loud music. I
3 don't actually recall if music was going on or not."

4 Then line 18 he said, "I left. I cleared the
5 case with no case, because there was no evidence of
6 either juveniles drinking alcohol or what I considered
7 to be a loud party."

8 On page page 9, line 16, I asked him, "What
9 kind of beverages did you observe the people consuming?"

10 His response was: "My recollection is soda
11 pop of different varieties and the typical stuff at a
12 party. Cookies."

13 And then finally on page 10, line 24, I asked
14 him, "And you didn't see any alcohol containers on the
15 premises?"

16 His response on the top of page 11: "I don't
17 recall seeing any."

18 And those were the excerpts that I wanted to
19 read.

20 THE COURT: All right. Thank you. Mr.
21 Shaffer, are there any excerpts you would like to put on
22 the record?

23 MR. SHAFFER: Well, Your Honor, I would just--
24 I never did order a copy of this and I didn't get a copy
25 of it, but in the-- in his testimony, I mean on

1 A. The purpose of it is just to make the
2 festival nice because we believe in the-- in the
3 Columbus Day.

4 Q. Okay.

5 A. But the thing is when you are telling me that
6 I contacted her is because I mentioned myself and I told
7 the secretary: "Can you please explain to her that we
8 want-- I want to talk with her because I want to ask her
9 permission."

10 Q. Okay.

11 A. And then before but my husband, he already
12 told me the radio flyer was supposed to be.

13 Q. So some time before the party on the 12th?

14 A. Uh-huh.

15 Q. Did Mrs. Bellamy call you?

16 A. I think she find out with this, with the
17 flyers, and she called me.

18 Q. What did she say to you on the phone?

19 A. She told me that, "Why do we going to go
20 ahead without any permission?" By that time I think
21 that my husband, he already called the California, the
22 owner.

23 Q. Right.

24 A. And then he explained to him and I think that
25 we had already permission from everyone. However, I

1 didn't want that she can be in charge, because she was
2 in charge of the office or the building, so that she was
3 not-- she wasn't the owner but she was in charge of it.
4 So I told her to-- I-- she called me and she said, "Who
5 gave you permission?" And I said, "Well, I think that we
6 have all the permission and all the rights." Because we
7 had been writing, I mean we had been asking permission
8 to the owner and she gave it to us."

9 And she said, "No. You are the Mexicans. You
10 are all of the same. You are wetbacks. You are--" and so
11 never in my life. Never. Never. Nobody is telling me
12 like that.

13 Q. Okay. Wait a minute. You just said a lot
14 there. What did she say about Mexicans?

15 A. Yeah. She said, "You are the Mexicans all the
16 same. You are such a--" And she swore. I don't remember
17 the word but she did.

18 Q. All right. And what was--

19 A. So I hang up. Excuse me. I hang up. So I
20 put-- I can't understand her voice and she yell at me,
21 she shout at me, and what do I have to say?

22 Q. Now, you said wetback. What did she say
23 about wetbacks?

24 A. Wetbacks. "You are grease, Mexican greases,"
25 and everything. She was just starting to denigrate us

1 as Mexicans and she also told us that, "You will never
2 going to be more up than us, than all of us. You think
3 that you are the best but you aren't.

4 Q. Okay. And you say grease, greasy?

5 A. Greasy and she said wetbacks.

6 Q. Okay.

7 A. She did. And I told her, "You don't know to
8 who we are. You don't know to who you are talking with,
9 but you will regret it." And then I hang up, very
10 angry.

11 Q. Was she yelling at you?

12 A. Yes, she was yelling at me and very angry
13 because we are going to do that, like harassing me.

14 Q. How did that make you feel when she called
15 you a wetback?

16 A. Well, as you can see, I react very horrible
17 because nobody has been telling me. You know, I try to
18 do-- we are not the same Mexicans that she thought of
19 us. Because we, my husband and I, we have been doing
20 such a good job since we got married. We are Mexicans
21 but different kind of Mexicans. We try-- we just don't
22 been here only over here, we've been around in Europe
23 and other places, even in England, because I went to--
24 he went to the school in England, I went to school in
25 England.

1 A. No. No. I said on Tuesday she called me.

2 Q. Okay. But the party was on Saturday?

3 A. On Saturday, yes.

4 Q. Did you hold school on the next Monday?

5 A. Did I? The week after, next Monday?

6 Q. Yeah, did school go the next Monday?

7 A. Yes.

8 Q. And so it went through what? It concluded
9 about October, the end of October is when you quit
10 having school there?

11 A. But you are asking me when we concluded the
12 party or when we concluded school?

13 Q. No. No. School.

14 A. All right. School has to have gone on and on
15 but--

16 Q. But what I am just asking--

17 A. Because of that they didn't come, the
18 students.

19 Q. But what I'm just asking you: Were all of
20 the students there that night?

21 A. All-- most of the students? Well, they were
22 but some of the people they didn't-- they have to leave
23 because--

24 Q. Ma'am--

25 A. They were hysterical.

1 the school like we have for the contract, as normal, but
2 at that time we told them to not to come until we had
3 some specific answer for them. See what I mean?

4 THE COURT: What were they worried about?

5 THE WITNESS: Well, because they were worried
6 why we were going-- we never had any police in there
7 and, you know, that Hispanic considers-- they are very
8 afraid because they were from the old country and they
9 really think that the police is a big deal. I mean it is
10 a big deal. But we didn't do nothing wrong so we had to
11 explain to them and to tell them that they had to settle
12 down until we solve the problem, one, two, or three days
13 we need. They are not back then. And they made the
14 decision like my husband explained.

15 THE COURT: So they were concerned about this
16 before you made the decision to leave?

17 THE WITNESS: The students, they were
18 concerned about our situation and they want to keep
19 going to the school or whether they can be in there or
20 what they will do in the future.

21 THE COURT: I see. Okay.

22 Q. (Mr. Shaffer) But no one told you to stop
23 the school, did they, from Mr. Hollander or Dr. Gray?

24 A. Well, they don't have any rights to do that.

25 Q. Right. I'm just asking. They don't have any

1 remains we didn't shut the party down, we didn't ask the
2 party to be shut down. If they were doing something
3 improper I guess that would have been up to the police
4 to have checked it and done it at that time. So I think
5 from that standpoint it doesn't matter whether or not.
6 Brenda, Ms. Bellamy, testified that Dr. Gray didn't
7 approve of the party but she still didn't stop the party
8 and it continued, it went on. So I think had we stopped
9 it, then we may have eliminated their use of the
10 facility for that particular party which still wouldn't
11 have interfered with their use of the facility for their
12 normal business. They were actually doing this outside
13 of the scope of the normalcy of their lease. So I think
14 from that standpoint, that's how I'm going to answer
15 that. Do you have any other questions on that
16 allegation?

17 THE COURT: No. I just think what the
18 argument is going to be, I think, is that-- or it would
19 seem like to they may have an argument that-- where this
20 leads, I don't know, but to give permission to-- for the
21 party after a discussion with Mr. Madrigal and reaching
22 some kind of an understanding, apparently as to what
23 this party really was about, it was not an alcohol
24 party, and then to send the police it after having given
25 permission, to check for juveniles drinking, it seems a

1 little unusual to me.

2 MR. SHAFFER: Well, and I don't know what
3 Mister-- what Dr. Madrigal-- he never testified what he
4 told Tom Hollander. There is no testimony to that. He
5 said he was going to have some kind of a festival there.
6 So I don't know what he told them. There is no testimony
7 that-- he didn't specifically say what Tom Hollander
8 allowed him to do, other than he said he said he could
9 have a party. But I still don't think that's unusual if
10 there's a concern because Mrs. Bellamy did testify that
11 she had information from one of the other tenants that
12 there was alcohol being served there, therefore, she
13 asked them to check that out. That's all. And so I think
14 the fact--

15 THE COURT: Well, she testified that she was
16 instructed by her boss to check it out.

17 MR. SHAFFER: Right. Yes, to check it out only
18 for that reason because she had reason to believe that
19 there was. So from that standpoint I'm sure if-- But I
20 think that's a reasonable basis, that they can check
21 something out, if they have reason to believe. I mean
22 she wasn't there. The party, it says here the party was
23 from two to twelve, two in the afternoon to twelve at
24 night, so while he said that he didn't hold it that
25 long, that's certainly what the flyer said. And that's

EXHIBIT "D"

Brenda and Chris Bellamy

From: "Brenda and Chris Bellamy" <bcpm@aros.net>
To: "OXFORD GROUP: Dr. Joseph Madrigal" <oxfordinstitute@aol.com>
Cc: "Tom Hollander" <thollander@charter.net>, "Jen" <jen.bcpm@aros.net>, "Peggy Wallace" <pwallace@naiutah.com>
Sent: Tuesday, October 08, 2002 5:29 PM
Attach: Brenda B. Bellamy.vcf
Subject: Gregson Square Suite D

Hi Dr. Madrigal!

It has been awhile since we communicated. I have left messages for you and/or Sonja to contact me on a couple of different occasions and have not received a return phone call. I am trying to obtain some information regarding a message you left for Mr. Tom Hollander regarding your lease at 3007 South West Temple, Suite D in South Salt Lake. I really need to discuss the status of your Lease as a result of the phone call you placed to the owner, Mr. Hollander.

Also, I need to address a concern we have with your office having parties at the property and turning your warehouse into a bar serving alcohol and charging a cover charge. **This is not allowed!** We have received reports from neighboring tenants complaining about the partying and nuisance of the noise and drinking on the premises which involved the police a few weeks back. Today, we became aware of a flyer that your office is passing around to the public and the other tenants inviting them to a "festival" where you are advertising that you are having alot of music and dancing and we have received word that you will be serving alcohol which is against the law. **Again, this is not allowed!** You are in violation of your lease and the zoning ordinance as this is a place for business not entertaining. I mentioned to the owner that you have had parties in the past and that you were planning another one and asked if that was okay and they said ABOSULUTELY NOT!. The liability for the owner of the building is enormous! Should anything happen as a result of the partying, Oxford will be solely responsible for any and all fines incurred as well as damages. It is extremely important that you contact me regarding this matter immediately!!! I have tried to discuss the matter with Sonja and she would not listen to me and said that she received approval; when, she had not, yet flyers were made up and distributed without verifying if it was allowed, or not.

I can not express enough the importance of your attention to this matter. Thank you!

Respectfully,

Brenda B. Bellamy

Brenda B. Bellamy
Principal Broker / Property Manager
BCPM, Inc.
Bellamy Properties, Inc.
Office: (435) 615-0482
Fax: (435) 615-0473

EXHIBIT "E"

(310) 392 7917

Subj:	Re: Gregson Square Suite D
Date:	10/8/02 11:19:48 PM Mountain Daylight Time
From:	OxfordInstitute
To:	bcpm@aros.net
CC:	thollander@charter.net, jen.bcpm@aros.net, pwallace@naiutah.com

Brenda,

What are you talking about? It seems like you have not check the facts (once again). Your email is insulting and upsetting. We are members of the Church of Jesus Christ of Latter-Day Saints. Hence, we do not drink or are involved on promoting ANY activities in which those types of beverages are served. It is unfortunate that the few times you have talked to me it is to request something, never to ask us how are we doing. In other words, no customer service AT ALL. In what follows I will answer all the innuendo you refer to.

BRENDA: "Also, I need to address a concern we have with your office having parties at the property and turning your warehouse into a bar serving alcohol and charging a cover charge. This is not allowed! We have received reports from neighboring tenants complaining about the partying and nuisance of the noise and drinking on the premises which involved the police a few weeks back. "

MY ANSWER:

These are all lies and innuendo. You need to be careful with your statements or you could be involved in legal problems. Do you think that we do not know the law? Do you realize what you just said? I challenge you to check with the police about that report you mentioned. There are lies. It is sad that you accepted as truth what the manager of the office next to us (Suite E) told you. We have always had problems with him. On the other hand, the ones that DRINK alcoholic beverages are our neighbours next door, your informants. I bet that you were not aware of it, umh. But you think that you are a good administrator, is not it? By the way, would you like to receive a copy of the flyers? So that, you could really check what is written there.

In case you have forgotten, from the beginning of our lease, I argued with the manager of the office next to us (Suite E) because they were parking on our area, Mr. Latimer, who used to be one of your tenants, Suite F or G believe) went with me to talked to the manager of Suite E because he also had the same problem. Did you remember that I asked your assistance on this matter but you never did anything. By the way, which tenants are you talking about there at only TWO. (Suite B and E).

BRENDA:

"Today, we became aware of a flyer that your office is passing around to the public and the other tenants inviting them to a "festival" where you are advertising that you are having alot of music and dancing and we have word that you will be serving alcohol which is against the law. Again, this is not allowed! You are in violation of your lease and the zoning ordinance as this is a place for business not entertaining."

ANSWER:

Why are you making those accusations? What is the matter with you, did you check the veracity of the lies you are sharing? Are you n. or what? For your information, my wife talked to Peggy a few weeks back, she explained her the purpose of the activity (out of courtesy) because we are a school. Hence, we could have activities with our students. That should not it be a problem.

The activity that we'll have on October 12 is to celebrate Columbus Days. In my position as President of the South Central Utah Hispanic Chamber of Commerce, Professor of BYU and well known person in the community, do you think that I will do ANY OF the stupidities you mentioned on your email? By the way, I personally invited Governor Leavitt to attend our activity. In addition to him, there are several organizations and/or VIP, such as the American Red Cross, Mexican Consulate, Peruvian Honorary Consul, Chilean Representative in Utah, Firefighters, United Way, International David Kennedy Center, that will participate in this activity.

It is really upsetting to read your false accusations (it makes me wonder about your motives, do you have a hidden agenda?) but I know that there are "Brendas" on the world. In my experience, the irresponsible actions of these Brendas have led to the biggest conflicts (& wars) in the history of mankind.

As far as we are concerned we have NOT VIOLATED the conditions of our lease or ANY LOCAL ORDINANCES.

"I mentioned to the owner that you have had parties in the past and that you were planning another one and

asked if that was okay and they said ABOSULUTELY NOT!"

Once again, let me repeat, as lesse of the building, we could use the building for social activities with our employees (NOT PARTIES). That should not it be a problem AT ALL. The problem with your statement is that you are wrong. But well I guess that is the way you are.

That's all for now.

Dr. Madrigal

PS: I strongly suggest to you to avoid these type of messages, remember the law of the land, if you are going to make an accusation you better have the facts and proofs. Otherwise, you run the risk of becoming involve in a legal problem.